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No. 87-248-CFX
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Docketed:
August 13, 1987

Title: Georgia Brower, Individually and as Administrator of the Estate of William James Caldwell (Brower), Deceased, et al., Petitioners
v.
County of Inyo, et al.

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Gilmore,Robert G.

Counsel for respondent: McDowell,Philip W.

Entry	Date	Note	Proceedings and Orders
1	Aug 13 1987	G	Petition for writ of certiorari filed.
2	Sep 16 1987		DISTRIBUTED. October 9, 1987
3	Sep 21 1987	P	Response requested -- JPS. (Due October 21, 1987)
4	Oct 13 1987		Response requested of other counsel, Gregory L. James.
6	Oct 26 1987		Order extending time to file response to petition until December 14, 1987.
8	Oct 26 1987		Order extending time to file response to petition until December 14, 1987.
9	Dec 12 1987		Brief of respondents in opposition filed.
10	Dec 16 1987		REDISTRIBUTED. January 8, 1988
11	Jun 10 1988		REDISTRIBUTED. June 16, 1988
13	Jun 17 1988		REDISTRIBUTED. June 23, 1988
14	Jun 27 1988		Petition GRANTED.
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16	Aug 8 1988		Order extending time to file brief of petitioner on the merits until August 23, 1988.
17	Aug 22 1988		Brief of petitioners Georgia Brower, etc., et al. filed.
18	Aug 22 1988		Joint appendix filed.
19	Sep 19 1988		Brief of respondents County of Inyo, et al. filed.
20	Oct 7 1988		CIRCULATED.
21	Oct 17 1988	X	Reply brief of petitioners Georgia Brower, etc., et al. filed.
22	Oct 24 1988		SET FOR ARGUMENT. Wednesday, January 11, 1989. (1st case) (1 hr.)
23	Jan 11 1989		ARGUED.

PETITION FOR WRIT OF CERTIORARI

87-248

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

GEORGIA BROWER, individually and as Administrator of the ESTATE OF WILLIAM JAMES CALDWELL (BROWER); WILLIAM JAMES CALDWELL (BROWER), Decedent; SCOTT DANIEL KING, a minor; RENEE KING, individually and as Guardian ad Litem for SCOTT DANIEL KING, Petitioners,

v.

COUNTY OF INYO, INYO COUNTY SHERIFF'S DEPARTMENT, DONALD DORSEY, CRAIG OYSTER, and REGINAL SIDES, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT G. GILMORE
Counsel of Record
LINDA J. ZACHRITZ
770 East Shaw, Suite 230
Fresno, California 93710
(209) 224-7900
Attorneys for Petitioner

QUESTIONS PRESENTED

1. Does the police use of an unilluminated roadblock to apprehend a fleeing felon constitute a seizure within the meaning of the Fourth Amendment of the United States Constitution?

2. Is the police use of an unilluminated roadblock to apprehend a fleeing felon an unreasonably dangerous or inappropriate method by which to accomplish a seizure?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

GEORGIA BROWER, individually and as Administrator of the ESTATE OF WILLIAM JAMES CALDWELL (BROWER); WILLIAM JAMES CALDWELL (BROWER), Decedent; SCOTT DANIEL KING, a minor; RENEE KING, individually and as Guardian ad Litem for SCOTT DANIEL KING, Petitioners,

v.

COUNTY OF INYO, INYO COUNTY SHERIFF'S DEPARTMENT, DONALD DORSEY, CRAIG OYSTER, and REGINAL SIDES, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, GEORGIA BROWER, et al., respectfully pray that a Writ of Certiorari issue to review the judgment

and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on May 15, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 817 F.2d 540 (9th Cir. 1987) and is reprinted in the Appendix hereto p. A-1, infra.

The memorandum decision of the United States District Court for the Eastern District of California (Coyle, D.J.) has not been reported. It is reprinted in the Appendix hereto, pp. A-19 and A-23, infra.

JURISDICTION

The petitioner brought this suit in the Eastern District of California invoking federal jurisdiction under 42 USC Section 1983.

On October 21, 1985 the Eastern District, on respondent/defendant's motion, dismissed plaintiff's First Amended Complaint as to defendant JAMES N. HOLMGREN, MISSOURI-NEBASKA EXPRESS and TRACTOR LEASE, INC.; the Eastern District further dismissed the First and Second Causes of Action of plaintiff's First Amended Complaint as to the remaining defendants.

Petitioner appealed these dismissals and on May 15, 1987, the Ninth Circuit, among other actions, affirmed the order of the Eastern District dismissing plaintiff's Fourth Amendment claim. No petition for rehearing was sought. The jurisdiction of this court to review the judgment of the Ninth Circuit is 28 USC Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV, Constitution of the United States:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV, Section 1, Constitution of the United States:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner filed this damage action in 1985 for wrongful death and civil rights violations based on 42 USC 1983, 1985 and 1988, and the Fourth, Fifth and Fourteenth Amendments to the U.S. Constitution. Jurisdiction of the District Court was invoked under 28 USC Sections 1331 and 1334.

Petitioners' complaint arises out of defendant's attempts to apprehend WILLIAM JAMES CALDWELL, Decedent, for allegedly possessing a stolen automobile. At approximately 11:30 p.m. on the night of October 23, 1984, decedent, a minor, was being pursued by Inyo County Sheriff's Deputy, CRAIG OYSTER. Decedent and OYSTER were driving southbound on Highway 395, a two-lane highway in Inyo County.

Deputy OYSTER pursued decedent through approximately 25 miles of desert land at which time Deputy OYSTER radioed ahead to Deputy SIDES requesting a road block. Deputy SIDES ordered the driver of an eighteen-wheel tractor-trailer rig to use his vehicle to block both the north and south bound lanes of Highway 395. The unilluminated tractor-trailer rig was located behind a curve in the highway. The police car of Deputy SIDES was parked in the middle of the highway approximately 200 feet in front of the tractor-trailer rig facing decedent's oncoming automobile. The headlights of Deputy SIDES' vehicle were turned on and shining directly at decedent's approaching vehicle. Decedent, proceeding at a high rate of speed, passed the right side of the police car, slammed into the tractor-trailer rig and died a short time after the collision.

Decedent is survived by his mother, GEORGIA BROWER, his fiancee, RENEE KING and his child, SCOTT DANIEL KING, born on July 3, 1985 and a party to this action by and through plaintiff, RENEE KING. On May 3, 1985 petitioners filed their complaint and demand for jury trial in the U.S. District Court for the Eastern District of California. On July 8, 1985 a motion to dismiss appellant's action was heard and the Eastern District issued an order dismissing Causes of Action One, Two and Three with leave to amend.

On August 1, 1985 petitioners filed their First Amended Complaint upon which respondents filed a motion to dismiss which was heard on October 7, 1985. On October 21, 1985 the Eastern District ordered that the entire complaint be dismissed as to all defendants. The court based its order on findings that the complaint alleged no constitutional

violation including a lack of a violation of substantive due process, that plaintiff was afforded an adequate remedy in state law and that all non-governmental entities or individuals were protected by absolute immunity from civil liability in this matter.

On or about February 25, 1986 petitioners filed in the United States Court of Appeals, Ninth Circuit, an appeal from the orders of the Eastern District. Argument was heard by the Ninth Circuit on December 10, 1986. The case was submitted on December 29, 1986 and a decision was entered on May 15, 1987.

In an opinion by Justice Goodwin, Justice Pregerson dissenting, the Ninth Circuit decided that petitioners' Fourteenth Amendment procedural and substantive due process claims, and claims against defendant, JAMES M.

HOLMGREN, the driver of the truck, were improperly dismissed and reversed the Eastern District as to those matters. The Ninth Circuit further held that the Eastern District properly dismissed petitioners' Fourth Amendment, Fifth Amendment and 42 USC Sections 1985 and 1988 claims as well as all claims against defendants, MISSOURI-NEBRASKA EXPRESS and TRACTOR LEASE, INC.

On June 25, 1987 petitioners dismissed JAMES M. HOLMGREN, MISSOURI-NEBRASKA EXPRESS and TRACTOR LEASE, INC. as defendants in this action. Petitioners now seek review in this court of the Ninth Circuit's affirmance of the dismissal of petitioners' Fourth Amendment claims.

REASONS FOR GRANTING WRIT

I.

THE NINTH CIRCUIT'S RULING THAT BROWER WAS NOT SEIZED WITHIN THE MEANING OF THE FOURTH AMENDMENT CONSTITUTES AN OVERLY NARROW INTERPRETATION OF SEIZURE IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS

The Fourth Amendment issue before the Ninth Circuit required, as stated by that court, a determination of whether there was a seizure of decedent BROWER and if so, whether the seizure was accomplished by unreasonable means. (p. A-9, infra). Tennessee vs. Garner, 471 U.S. 1, 105 S.Ct. 1694 (1985). Petitioner agrees that this is the proper test to be applied in this case, but disputes the Ninth Circuit's interpretation of the meaning and breadth of

"seizure."

In its determination that there was no seizure of decedent BROWER the Ninth Circuit construed the meaning of "seizure" so as to be irreconcilable with this court's interpretations of a Fourth Amendment seizure. Previous decisions of this court have held that a person is seized whenever a police officer restrains the freedom of the person to walk away. U.S. vs. Brigoni-Ponce, 422 U.S. 873, 878, 95 S.Ct. 2574, (1975). While recognizing that there is often a fine line between what particular police contact with a citizen does and does not constitute a seizure, the court has most recently held that "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." Tennessee vs. Garner, 471 U.S. 1, 7, 105 S.Ct. 1694 (1985).

The decision rendered by the Ninth Circuit is further in conflict with a decision of the Fifth Circuit Court of Appeals involving facts directly on point with those in the instant case. Jamieson vs. Shaw, 772 F.2d 1205 (5th Cir. 1985) involved police attempts to apprehend a suspect by use of a "deadman" roadblock, Jamieson vs. Shaw, 772 F.2d at 1207, the same type of roadblock used to capture BROWER. The suspect in Jamieson failed to stop and collided with the roadblock injuring plaintiff, a passenger in the suspect's car. Plaintiff's First Amended Complaint, in part alleging a violation of her Fourth Amendment protection against unreasonable search and seizure, was dismissed by the District Court and she was later denied leave to amend. Jamieson vs. Shaw, 772 F.2d 1205, 1207-1208 (1985).

The Fifth Circuit applied the rule

of Brigoni-Ponce that "whenever an officer restrains the freedom of a person to walk away, he has seized that person." U.S. vs. Brigone-Ponce, 422 US 873, 878, (1985). The Fifth Circuit concluded that plaintiff, Jamieson, had been seized within the meaning of the Fourth Amendment "when the officers deliberately placed the roadblock in front of the car in which they knew she was a passenger." Jamieson, 772 F.12d at 1210.

In the decision below, the Ninth Circuit did not consider the issue of whether or not decedent BROWER had been apprehended by the use of unnecessary force. The court simply concluded that because defendant BROWER's "freedom of movement" was not physically restrained there was no seizure. (p. A-9, infra), relying on Galas vs. McKee, 801 F.2d 200 (6th Cir. 1986) (no seizure where a high-speed chase ended in suspect losing

control of his vehicle). Galas argued that the alleged restraint on the suspect's feedom to leave did not result due to a show of authority by officers, but occurred as a result of the suspect's decision to disregard the officer's authority and the suspect's own inability to drive at high speeds. Galas vs. McKee, 801 F.2d 200.

The Ninth Circuit's justifications for its holding imply that the only active participant in the collision was decedent BROWER who was consciously attempting to flee from the police. The court seemingly ignores the reality that the officer's use of the roadblock was the use of force which in fact restrained BROWER's ability to leave. Such reasoning creates a situation where police officers can affirmatively act to set up an unilluminated roadblock, yet still remain passive for purposes of the

Fourth Amendment and wait to see if a suspect's "conscious decision to flee" leads him into a collision. It is manifestly incompatable with the precedents of this court that the Fourth Amendment's protection against unreasonable seizure be afforded to a criminal suspect car driver who voluntarily stops in response to flashing police car lights, U.S. vs. Hensley, 469 U.S. 221, 105 S.Ct. 675 (1985); U.S. vs. Bannister, 449 U.S. 1, 101 S.Ct. 42 (1980), yet not be afforded to the same driver who attempts to flee and who's progress is summarily halted by an unlit barricade across the road.

As a result, the Ninth Circuit has created precedent whereby criminal suspects, undertaking almost identical acts, may be subject to varying degrees of protection under the Fourth Amendment. Guidance from this court would allow

lower courts to operate under a single definition of "seizure", resulting in each individual being afforded the same protections against unreasonable seizure regardless of the federal district he happens to be in.

II.

BY FAILING TO DECIDE THE ISSUE OF REASONABLENESS, THE NINTH CIRCUIT HAS LEFT OPEN SERIOUS QUESTIONS REGARDING THE BALANCE OF THE EXTENT OF INTRUSION AND THE NEED FOR THE INTRUSION PERMISSIBLE UNDER THE FOURTH AMENDMENT

Due to its finding that no Fourth Amendment seizure of BROWER had been accomplished, the Ninth Circuit did not reach the question of whether the use of an unilluminated roadblock to seize a suspected felon is unreasonable conduct. (p. A-10, infra). In doing so the court

did not address questions raised by the District Court's finding that "as a matter of law the roadblock alleged to have been established was not . . . unreasonable" (p. A-21, infra).

The determination of a seizure's reasonableness requires that a court "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." Garner, 471 U.S. at 8, quoting United States vs. Place, 462 U.S. 696, 703 (1983). In applying this test the District Court was unable to fully evaluate the nature and quality of the intrusion on BROWER's rights by failing to take into account plaintiff's allegations that BROWER was blinded by the lights of the police car. As noted by Justice Pregerson (dissenting) in the

court below, the "plaintiff's allegation that Brower could not see the roadblock was a factual allegation that the District Court was required to accept as true for purposes of the motion to dismiss" (p. A-17, infra), citing Plaine vs. McCabe, 797 F.2d 713, 723 (9th Cir. 1986).

Contrary to the requirements of Garner the District Court, at most, only indirectly considered, and in effect minimized, the nature of the intrusion upon BROWER's rights. The only fact used by the District Court is that, "decedent was warned . . . by a police vehicle parked in the middle of the highway facing decedent approximately 200 feet ahead of the roadblock," (p. A-21, infra) both of which were behind a curve. While "assuming arguendo that the establishment of a roadblock constitutes the use of deadly force" (p. A-21, infra), the

District Court failed to note that the "intrusiveness of a seizure by means of deadly force is unmatched" Garner, 471 U.S. at 9 and failed to analyze the intrusion accordingly.

In weighing the governmental interest involved, this court has stated that "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable." Garner, 471 U.S. at 11. The importance of these interests is recognized and given considerable weight in Garner to the extent that in appropriate circumstances "deadly force may be used if necessary to prevent escape . . . if, where feasible, some warning has been given." Garner, 471 U.S. at 12. A warning, in any meaningful sense of the word, is to inform a person of a danger ahead. In the present case the police car's lights

were not shining on the roadblock to warn of its existence, but were shining at BROWER's approaching vehicle, blocking visibility of the danger which BROWER was rapidly approaching.

In the instant case the governmental interests focused on by the District Court are the interests of apprehending suspected felons, and of protecting police officers and others. Petitioners do not fail to appreciate the importance of these interests. Similarly petitioners do not dispute the well settled authority of police to establish roadblocks as a means of apprehending felons. LaFave, 3 Search and Seizure, Section 9.5(c) (2d ed. 1987), Kagel vs. Brugger, 19 Wisc. 2d 1, 119 N.W. 2d 394 (1963).

These governmental interests could have been fully met simply by providing BROWER with the most elementary kind of

warning: sufficient lighting to enable BROWER to see the roadblock and stop in time to avoid a collision. The use of a lighted roadblock allows the police to arrest a suspect and put in motion the criminal justice process which will determine guilt. The use of an unlit roadblock, placed behind a curve, and hidden by bright lights shining at the intended subject,[1] is most likely to leave the police and the courts only with a dead suspect.

The Ninth Circuit provided no standard with respect to the use of roadblocks to capture fleeing suspects. Thus the District Court's failure to adequately weigh the extent of the intrusion on BROWER's Fourth Amendment rights against the government's interests

[1] The very name "deadman" roadblock Jamieson vs. Shaw, 772 F.2d 1205, 1207 (5th Cir. 1985), signals the intended result of its use.

in apprehending BROWER, as required by decisions of this court, provides no guidance to officers aside from a broad acceptance of such procedures.

CONCLUSION

For the reasons stated in this Petition, certiorari should be granted to Petitioners. Should the court hold that the Ninth Circuit incorrectly decided the Fourth Amendment issues raised by Petitioners, the matter should be remanded to the District Court for appropriate action.

DATED: August 12, 1987

Respectfully submitted,

Robert G. Gilmore

ROBERT G. GILMORE
Counsel of Record

LINDA J. ZACHRITZ
ATTORNEYS AT LAW
770 East Shaw, Suite 230
Fresno, California 93710

ATTORNEYS FOR PETITIONERS

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 85-2857
D.C. No. CV-F-85-265 REC

Georgia Brower, individually and as administrator
of the Estate of William James Caldwell (Brower);
William James Caldwell (Brower): Decedent,
Scott Daniel King, a minor, Renee King,
individually and as Guardian ad litem for
Scott Daniel King,
Plaintiffs-Appellants,

v.

County of Inyo, Inyo County Sheriff's Department,
Donald Dorsey, Craig Oyster, Reginal Sides,
James M. Holmgren, Missouri Nebraska Express
and Tractor Lease, Inc.,
Defendants-Appellees.

Argued December 10, 1986
Submitted December 29, 1986
San Francisco, California
Filed May 15, 1987

OPINION

GOODWIN, Circuit Judge:

William James Caldwell (Brower) died in a collision between an automobile he was driving and a truck employed as a roadblock by the Inyo County police. Brower's mother, as representative of Brower's estate, brought an action pursuant to 42 U.S.C. § 1983 alleging violations of Brower's constitutional rights. The mother and other family members also asserted liability under state law for negligence and wrongful death. The district court dismissed the nongovernmental defendants from the action and then dismissed the complaints against the governmental defendants, effectively dismissing the action. Plaintiffs appeal.

At approximately 11:30 p.m., on October 23, 1984, the decedent was driving southbound on Highway 395 pursued by an Inyo

County Deputy Sheriff, Craig Oyster. Deputy Oyster believed Brower to be in possession of a stolen automobile; a felony under the law of the State of California. The pursuit continued at high speeds over a total distance of approximately twenty miles. At some point during the pursuit, Oyster radioed ahead to establish a roadblock.

The roadblock was set up by Deputy Reginal Sides with the assistance of a truck driver, James M. Holmgren, employed by Missouri-Nebraska Express. Holmgren was directed to place the tractor-trailer within his control across the highway to block both lanes of the two-lane highway. Sides then parked his own police vehicle 200 feet ahead of the tractor-trailer between it and the approaching Brower. He directed the headlights of his vehicle toward the approach path of Brower. Some time later, Brower drove past the side of Sides' police vehicle at a high rate of speed and slammed into the tractor-trailer rig. Brower died shortly after impact. This litigation followed.

As a prelimninary matter, we must determine whether we have subject matter jurisdiction.

We have jurisdiction over appeals from "final decisions" of the district courts. 28 U.S.C. § 1291. In an action involving multiple defendants, the dismissal of the complaint only, without dismissal of the action, is not a final judgment. Therefore, ordinarily, an order dismissing a complaint but not the underlying action, will not support jurisdiction under 28 U.S.C. § 1291.[1] *California v. Harvier*, 700 F.2d 1217, 1218 (9th Cir.), *cert. denied*, 464 U.S. 820 (1983); *Scanlon v. Atascadero State Hospital*, 677 F.2d 1271, 1272 (9th Cir. 1982).

It is clearly the better practice to obtain a final judgment before commencing an appeal in the courts of appeals.[2] However, we

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[1] 28 U.S.C. § 1291 (1982) provides:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .

[2] Parties faced with an order dismissing the complaint but not the underlying action may ordinarily amend their complaint. Fed. R. Civ. P. 15(a); *Scanlon*, 677 F.2d at 1272. Similarly, parties in actions involving

have accepted jurisdiction on the basis of an order dismissing a complaint when the record has indicated "special circumstances." *Firchau v. Diamond National Corp.*, 345 F.2d 269, 270-71 (9th Cir. 1965). We have also accepted jurisdiction when it is "clear" that the trial court found that "the action could not be saved by any amendment of the complaint which the plaintiff could reasonably be expected to make." *California*, 700 F.2d at 1218, (quoting *Marshall v. Sawyer*, 301 F.2d 639, 643 (9th Cir. 1962)). *See also Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1171 n.1 (1984) (where we accepted jurisdiction (order dismissing complaint) because "the district court intended to dispose of the action"). *See generally* 9 J. Moore, *Moore's Federal Practice* ¶ 110.13 [1] (2d ed. 1986 and 1985-86 Supp.).

In supplemental briefs addressed to the question, counsel have persuaded us that the district court, by dismissing the nongovernmental defendants outright and dismissing the remaining causes of actions against the governmental defendants, effectively dismissed the action against all the defendants. While this kind of wasted time should not be billed in any ensuing claim for attorney fees, the county has not been prejudiced. Accordingly, we conclude that the district court's dismissals support our jurisdiction under 28 U.S.C. § 1291.

The fourteenth amendment due process claim.

The plaintiffs contend that the use of the roadblock was egregious police misconduct violating Brower's fourteenth amendment due process rights. The district court held, as a matter of law, that the roadblock did not violate Brower's due process rights. This ruling is challenged on both substantive and procedural grounds.

The nature of a so-called "substantive" due process claim in the police brutality context is outlined in *Rochin v. California*, 342 U.S. 165 (1952). In *Rochin*, the court reversed a conviction

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multiple claims or multiple parties are entitled, up to the time of entry of a final judgment, to seek revision of "any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties." Fed. R. Civ. P. 54(b). *See also* Fed. R. Civ. P. 62(h).

that had been partially based on evidence obtained by subjecting petitioner to a stomach pump while in police custody. The court reasoned that an individual's undefined substantive rights include the right to be free from governmental actions that "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." *Id.* at 169. While the court did not articulate specific standards which identify police conduct violative of "substantive due process," it did state that such violations exist where conduct "shocks the conscience" or constitutes force that is "brutal" and offends "even hardened sensibilities." *Id.* at 172-73. *See also Palko v. Connecticut,* 302 U.S. 319, 325 (1937).[3]

In *Johnson v. Glick,* 481 F.2d 1028 (2d. Cir.), *cert. denied,* 414 U.S. 1033 (1973), Judge Friendly, speaking for the Second Circuit, articulated useful standards for substantive due process violations. Starting with the premise that violations of substantive due process by law enforcement must be more egregious than simple tort actions, he wrote that:

> [I]n determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm.

Id. at 1033.

In *Meredith v. State of Arizona,* 523 F.2d 481, 484 (9th Cir. 1975), we adopted the *Johnson* analysis. In *Meredith,* a claim

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[3] Note that there is a significant "boundary overlap" between the fourth amendment "reasonableness" test for police actions and the fourteenth amendment substantive due process "shocks the conscience" test. As neither category of right is subject to the *Parratt v. Taylor,* 451 U.S. 527 (1981), limitations, as yet, *see Robins v. Harum,* 773 F.2d 1004 (9th Cir. 1985), the distinction, although troubling at the level of constitutional theory, has been accorded little practical significance for section1983 litigation.

arising out of an alleged prison beating by state officials, we stated that conduct violates substantive due process when it can fairly be characterized as "intentional, unjustified, brutal, and offensive to human dignity." *Id.* at 484.

In *Rutherford v. City of Berkeley*, 780 F.2d 1444 (9th Cir. 1986), we applied the *Meredith* criteria and held that allegations of an unprovoked police assault—including repeatedly punching and kicking an individual in custody—stated a claim. *See also Johnson v. Barker*, 799 F.2d 1396, 1400 (9th Cir. 1986) (sheriff's abuse of process and malicious prosecution did not give rise to due process claim); *Escamilla v. City of Santa Ana*, 796 F.2d 266, 258 (9th Cir. 1986) (failure of undercover police to protect innocent victim in a barroom shooting did not state a due process claim); *Gaut v. Sunn*, 792 F.2d 874, 875 (9th Cir. 1986) (prison beating by guards did state a due process claim).

The first amended complaint asserts that specific factors in the creation and use of the roadblock by the Inyo County police violated substantive due process. In particular, paragraph 21 of the complaint alleges that the defendants "effectively concealed said truck [the tractor-trailer roadblock] from decedent's view by parking same behind a curve, failing and refusing to illuminate same and "blinding" decedent by parking a police vehicle in the center of the highway between said truck and decedent's approaching vehicle." For Rule 12 purposes we treat these allegations as true only because the district court dismissed for failure to state a claim. *Gaut*, 792 F.2d at 875. The allegations in paragraph 21 contain little more than bare conclusions, but if not sham or frivolous, they state a claim for violation of substantive due process. The allegations plead more than garden variety negligence in the construction of the roadblock.

The fourteenth amendment procedural due process claim.

The plaintiffs also contend that the roadblock violated Brower's fourteenth amendment procedural due process rights.[4] The dis-

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[4] "Procedural due process" is a tautology that has become jargon. Our use of it does not imply approval of the term, but only our surrender to its prevalence. It is probably too late to express continuing dismay over the use of the oxymoron "substantive due process."

trict court, relying on *Parratt v. Taylor*, 451 U.S. 527 (1981), dismissed this claim as well as the other attempts to plead that the officers deprived Brower of his life without due process of law.

The existence of remedies in the state courts and administrative agencies for deprivations of procedural rights does not necessarily bar otherwise valid claims brought under section 1983. *Parrott* bars recovery for property losses caused by random and unauthorized acts of state officials or private parties acting under "color of state law." *Parratt*, 451 U.S. at 543; *Rutledge v. Arizona Board of Regents*, 660 F.2d 1345, 1352 (9th Cir. 1981), *aff'd on other grounds sub nom. Kush v. Rutledge*, 460 U.S. 719 (1983). An extension of *Parratt*, *Hudson v. Palmer*, 468 U.S. 517 (1984), also bars recovery for isolated violations which result from intentional acts of state officers. Those cases, however, do not apply to the pending amended complaint.

The Supreme Court in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), expressly declined to extend the *Parratt* doctrine to bar claims alleging violations resulting from adherence to an established state policy, pattern, or procedure. Thus, if the deprivation of due process rights is alleged to result from application of a state pattern or practice, the availability, after the loss, of a state remedy is immaterial to the federal cause of action. *Logan*, 455 U.S. at 435-436.

We have applied *Logan*, and not *Parratt* or its progeny, when a complaint has adequately alleged that a state "pattern or practice" had led to fourteenth amendment violations. In *Sanders v. Kennedy*, 794 F.2d 478 (9th Cir. 1986), petitioners alleged that city police intentionally caused substantial damage to their home and motor vehicles during a "10-hour siege." In addition, the complaint alleged that the wrongful police conduct had been authorized by city officials and performed pursuant to an "official policy, practice, and custom" of the city. *Id.* at 482. Applying *Logan*, we held that the complaint stated a claim for a violation of due process and consequently that the district court erred in dismissing the complaint. *Id. See also Mann v. City of Tucson*, 782 F.2d 790, 798 (Sneed, J. concurring) (*Parratt* analysis is irrelevant to claims based upon an "unconstitutional state law, policy, procedure, pattern, or practice"); *Haygood v. Younger*,

769 F.2d 1350, 1359 (9th Cir. 1985) (en banc) (*Logan*, not *Parratt*, applies where wrongful deprivation of liberty results from affirmatively enacted or de facto policies, practices, or customs), *cert. denied sub nom. Cranke v. Haygood*, 106 S.Ct. 3333 (1986).

Paragraph 21 of the first amended complaint alleges that the defendants utilized the described roadblock method for detaining Brower "pursuant to a policy and procedure of defendants Inyo County and Inyo County Sheriff's Department." This allegation, because it purports to state a "pattern and practice" claim under *Logan*, survives Rule 12 dismissal based on *Parratt*. The use of roadblocks as a "pattern and practice" per se is not a violation,[5] but the pattern and practice of using a roadblock designed as a deathtrap, if established by proof, could be a violation of due process. A court should be reluctant to "declare a police practice of long standing 'unreasonable' if doing so would severely hamper effective law enforcement." *Tennessee v. Garner*, 471 U.S. 1, 19 (1985). Whenever a challenge to the constitutionality of the use of a roadblock to apprehend a fleeing felon has arisen in state court, the practice has uniformly been upheld. *Kagel v. Brugger*, 19 Wis.2d 1, 119 N.W.2d 394 (1963); *State v. Hatfield*, 112 W. Va. 424, 164 S.E. 518, 519 (1932). *See generally* J. Cook, *Constitutional Rights of the Accused: Pre-Trial Rights, Arrest* § 8 (1972 & 1984 Supp.)

Applying *Logan*, we hold that the elements of concealment and intentional blinding of the driver as a departmental policy and practice state a claim for violation of Brower's due process rights. Surviving Rule 12(b)(6) dismissal, however, does not assure a successful claim. At the summary judgment or later stages, the court may find no basis for proceeding if plaintiff produces

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[5] The record at the Rule 12 stage did not reveal whether the police car's emergency lights were flashing when it was situated in front of the roadblock. Affidavits filed in subsequent proceedings should clarify this matter. A roadblock is intended to give the driver an opportunity to stop before someone is killed or injured. Brower, unless the plaintiffs can come forward with proof to support their allegations of an intentional deathtrap, had complete freedom of choice, and rejected the option to stop.

nothing but conclusory allegations of a pattern or practice of employing deathtrap roadblocks to stop delinquent motorists.

Fifth amendment and sections 1985 and 1988 claims.

The plaintiffs also appear to reassert claims for relief, based on 42 U.S.C. § 1983, for violations of the fifth amendment, as well as claims under 42 U.S.C. §§ 1985 and 1988. These scattergun claims illustrate the quality of the pleadings placed before the trial court.

The due process clause of the fifth amendment constrains the activities and decisions of the federal government and its actors. The complaint alleged no federal involvement of any kind in the death of the decedent. The district court correctly dismissed the fifth amendment cause of action for failure to state a claim.

A valid section 1985(3) claim must be supported by allegations as to the existence of a conspiracy, with racial or discriminatory animus, to deprive a person of his civil rights. The amended complaint does not allege such a conspiracy. Accordingly, the district court correctly dismissed the section 1985 claim.

Recovery of attorney fees under section 1988 is premised on the existence of a prevailing claim under sections 1983 or 1985. Section 1988 does not support an independent cause of action. No fees have been earned at this time, as the plaintiffs have recovered nothing. Most of the time spent by plaintiff's counsel thus far has merely made extra work for the courts and the opposing counsel.

Fourth amendment claim.

The plaintiffs also contend that the roadblock created by the police violated Brower's fourth amendment rights because it represented an unreasonable seizure by means of deadly force. The district court reviewed the circumstances leading up to the establishment of the roadblock and concluded, as a matter of law, that the use of the roadblock did not violate the fourth amendment.

To determine whether a pleading states a fourth amendment cause of action, courts apply a two-stage analysis emanating from *Tennessee v. Garner*, 471 U.S. 1 (1985). First, the court must

determine whether there was a "seizure" in the fourth amendment sense. Second, the court must determine whether that "seizure" was accomplished in an unreasonably dangerous or inappropriate manner. *Galas v. McKee*, 801 F.2d 200, 202 (6th Cir. 1986); *Robins v. Harum*, 773 F.2d 1004, 1009-10 (9th Cir. 1985). The type of force employed (lethal or otherwise) is relevant in evaluating the "reasonableness" of police bahavior.

With respect to the "seizure" question, the plaintiffs, relying on *Terry v. Ohio*, 392 U.S. 1 (1968), contend that the roadblock was a "seizure" of Brower. We find no support in the cases for such a contention. Although Brower was stopped in the literal sense by his impact with the roadblock, he was not "seized" by the police in the constitutional sense. Prior to his failure to stop voluntarily, his freedom of movement was never arrested or restrained. He had a number of opportunities to stop his automobile prior to the impact.

An analagous situation arose in *Galas* where a police officer engaged in a high-speed chase of a fleeing traffic offender. The chase ended when the fleeing driver lost control and crashed. The question arose whether the crash was a "seizure" under the fourth amendment. The court concluded that there had been no seizure by the police because the officers had failed to impose restraint on the individual's freedom to stop or drive away. The court reasoned as follows:

> During the initial stages of the pursuit at issue here, plaintiff was not restrained at all .... During the latter stages—when plaintiff crashed—he was tragically not free to walk away. This restraint on plaintiff's freedom to leave, however, was not accomplished by the show of authority but occurred as a result of plaintiff's decision to disregard it.

Galas, 801 F.2d at 203.

We agree with the *Galas* decision. In this case, as the twenty-mile chase makes plain, Brower consciously chose to avoid official restraint. That decision, an exercise of autonomy, cannot fairly be viewed as a "seizure" by the police, under the fourth amendment. Brower's seizure, if any, was the result of his own effort in avoiding numerous opportunities to stop. We have found no cases

which hold that a roadblock intended to stop a particular fleeing driver works a "seizure" of that driver. The cases cited by the plaintiffs are distinguishable. Each involves either fourth amendment claims by parties for whom the roadblock was not intended (*Jamieson v. Shaw*, 772 F.2d 1205 (5th Cir. 1985) or roadblocks created for reasons other than to stop a fleeing suspected felon. In *Jamieson*, the plaintiff was a passenger who presumably had no choice in the driver's election to crash into the police baricade. We see no need to stretch the fourth amendment seizure to provide another theory for a tort claim which involves the combined intentional conduct of both victim and defendants. That conduct can be fully evaluated under ordinary tort principles without any need to reach out for a bizarre definition of "seizure." Accordingly, we hold that no fourth amendment "seizure" occurred.

Because we hold that there was no seizure, we need not determine "reasonableness" of police conduct challenged under the fourth amendment. Reasonableness may well be relevant in connection with claims alleged under the due process clause of the fourteenth amendment as discussed above. A court "must balance the nature and quality of the governmental intrusion . . . against the importance of the governmental interest alleged to justify the intrusion." *Garner*, 471 U.S. at 8 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)). In a case in which an attempted arrest results in death, the court is required to decide whether the means by which the arrest was carried out were sufficiently justified by the need for the arrest. Unreasonable force under particular circumstances might violate due process. It adds nothing to a well pleaded due process claim to assert that there was an unlawful seizure. The court did not err in striking the fourth amendment claim.

Dismissal of the nongovernmental defendants.

The plaintiffs contend that the nongovernmental defendants were incorrectly dismissed from the action. The district court dismissed the nongovernmental defendants because it concluded that the complaint did not plead sufficient facts to link them to any alleged wrongdoing. *Cf. Adickes v. Kress & Co.*, 398 U.S. 144,

152 (1970). The court also was of the opinion that the nongovernmental defendants were immune from liability.

For a complaint to allege a valid claim against private parties for a deprivation of protected rights under section 1983, it must allege that specific conduct by a party was a proximate cause of the section 1983 injury. *King v. Massarweh*, 782 F.2d 825, 829 (9th Cir. 1986); *Arnold v. International Business Machines Corp.*, 637 F.2d 1350, 1356 (9th Cir. 1981).

In *King*, after a landlord's request for police intervention, tenants were roughly arrested by police officers. The tenants subsequently brought a section 1983 action, alleging violations of fourth amendment rights, against the police officers, the City of San Francisco, and the landlord. We held that the tenants' complaint stated a claim against the governmental defendants but not against the landlord. The landlord, although a "but for" cause of the police presence—his request for police assistance in effecting evictions led to the police involvement—was not sufficiently connected to the allegedly offending state action to have "caused" the acts to occur within the meaning of section 1983. *King*, 782 F.2d at 829.

In *Arnold*, IBM originally brought a trade secrets action against Arnold. In connection with the action, state officials wrongfully searched Arnold's residence. Arnold brought an action, under section 1983, against the state officials and IBM. We held that IBM did not proximately cause Arnold's injuries, within the meaning of section 1983, because there was no indication that it exercised any control over the wrongful state conduct. *Arnold*, 637 F.2d at 1356-57.

Defendants Missouri-Nebraska Express and Tractor Lease, Inc., were employers of defendant James N. Holmgren. The employer-defendants owned the tractor-trailer rig used by the police as a roadblock. While paragraph 16 alleges "on information and belief" that all the nongovernmental defendants were "acting within the course, scope and purpose of [an] agency with the [governmental defendants] and conspired among each other in doing all things herein alleged," the pleading is dangerously close to a Fed. R. Civ. P. 11 violation if not supportable by proof.

With respect to the employer defendants, the conclusory allegations of the complaint fail to allege with sufficient particularity any substantial involvement of defendants Missouri-Nebraska Express or Tractor Lease, Inc. in the creation or manner of use of the roadblock. In essence, each is linked to the roadblock solely by virtue of the ownership of equipment at a location convenient to the Inyo County police. No fact alleged against the employers could be a proximate cause of any of the alleged police wrongdoing within the meaning of section 1983. We also see no basis for concluding that the employers here "jointly engaged with state officials" in a prohibited activity capable of sustaining liability under section 1983. *Cf. Adickes,* 398 U.S. at 152. The district court properly dismissed them from the action.

The complaint contains ambiguous allegations that the driver, James N. Holmgren, exercised independent control over the positioning of the tractor-trailer across the highway. The district court noted in its decision and order of October 21, 1985, that "[P]laintiffs were unable at oral argument to state any facts showing that Holmgren exercised any discretion in the establishment of the roadblock" Moreover, plaintiffs stated in moving papers that Deputy Sides "commandeered an eighteen-wheel tractor-trailer rig and ordered the driver to block both the northbound and southbound lanes." Since Holmgren did not act from an independent motive or in a manner foreseeably harmful to Brower's civil rights, and did not agree to be a joint participant in prohibited acts of state officers, he cannot be held liable under section 1983. However, under the rule that the district court should construe pleadings in favor of the nonmoving party, Holmgren was prematurely dismissed. If, on further proceedings, plaintiffs fail to produce proof that Holmgren knowingly participated in any unlawful acts by the officers other than as a "commandeered" party, he should be dismissed with costs and attorney fees.

CONCLUSION

We remand this action to the district court because it dismissed defendant Holmgren and the fourteenth amendment due process claims prematurely under Rule 12. We do not reach the merits. Other dismissals challenged in this appeal are affirmed.

Reversed in part, affirmed in part, and remanded for proceedings consistent with this opinion. No party to recover costs.

PREGERSON, concurring in part and dissenting in part:

I join all of the majority's opinion except for its application of the fourth amendment. I believe the police roadblock operated to "seize" Brower, and accordingly I would give appellants an opportunity to show whether the "seizure" was accomplished in an unreasonable manner. *Tennessee v. Garner,* 471 U.S. 1 (1985).

Because the district court dismissed the plaintiff's first amended complaint for failure to state a claim, all the allegations in the complaint must be accepted as true and construed in the light most favorable to the plaintiffs. *Plaine v. McCabe.* 797 F.2d 713, 723 (9th Cir. 1986).

Police officers suspected Brower of driving a stolen vehicle. A high speed chase ensued. During the chase, the officers set up a roadblock to force Brower to stop. The roadblock consisted of an eighteen-wheel tractor-trailer placed across both lanes of a highway and a police car parked 200 feet in front of the tractor-trailer in Brower's approach path.

The complaint alleges that the officers "effectively concealed" the roadblock by parking the tractor-trailer behind a curve. The complaint also alleges that the police officers "blinded" Brower by shining police car headlights "directly into his eyes as he approached." The blinding effect of the headlights, the complaint concludes, caused Brower to crash into the roadblock and sustain fatal injuries.

The majority concludes that the police officers failed to "seize" Brower when he crashed. The opinion suggests that the roadblock could not operate to "seize" Brower because he "consciously chose to avoid official restraint" by attempting to flee the police. I submit that the majority's analysis misapprehends the Supreme Court's test for establishing whether a "seizure" has occurred under the fourth amendment.

1. Seizure

A "seizure" occurs "whenever a police officer . . . restrains [an individual's] freedom to walk away." *Terry v. Ohio*, 392 U.S. 1, 16 (1968). Under this definition, there is no question that the Inyo police officers "seized" Brower. The officers intended to stop Brower and did stop him by setting up the roadblock. The officers totally deprived Brower of his freedom to walk away.[1]

In *Tennessee v. Garner*, 471 U.S. 1, 7 (1985), the Supreme Court held that "apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." In that case, police officers suspected Edward Garner of having committed a burglary. Pursued by the officers, Garner, who was unarmed, ran across a yard and encountered a six-foot chain link fence. An officer told him to stop, but Garner began climbing the fence. The officer shot Garner in the back of the head and killed him. The Supreme Court found that the shooting of the unarmed fleeing suspect constituted an unreasonable seizure in violation of Garner's fourth amendment rights.

I believe that *Garner* compels finding that the Inyo police officers "seized" Brower when he crashed into the roadblock. As in *Garner*, this case involves the use of deadly force by the police to apprehend a fleeing suspect. In both cases, the suspect might have been well-advised to surrender, but the fact that he resisted police authority does not change the fact that the police physically "seized" his person. In both cases, the police deprived the suspect of his ability to walk away in the most absolute and tragic sense.

The majority opinion argues that because Brower retained his freedom of movement until the crash, the crash itself was not a "seizure." The opinion states:

> Although Brower was stopped in the literal sense by his impact with the roadblock, he was not "seized" by the police in the constitutional sense. Prior to his failure to stop voluntarily, his freedom of movement was never arrested or

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[1] The district court did not even question whether a "seizure" had occurred. The court implicitly assumed that the roadblock "seized" Brower and concluded that use of the roadblock was reasonable.

restrained. He had a number of opportunities to stop his automobile prior to the impact.

The fact that Brower could have voluntarily submitted to police authority before crashing into the roadblock is irrelevant in determining whether a "seizure" occurred. The fleeing suspect in *Garner* also retained his freedom of movement prior to his failure to stop voluntarily. But in *Garner*, a "seizure" nevertheless occurred the moment the officer deprived the suspect of his freedom to walk away. Here, too, Brower's freedom to walk away was restrained by the police. His decision to flee merely delayed the moment at which the "seizure" ultimately occurred.

A Fifth Circuit case supports the view that a police roadblock operates to "seize" its victims. In *Jamieson v. Shaw*, 772 F.2d 1205 (5th Cir. 1985), the plaintiff was a passenger in a car that struck a roadblock set up by the police on a state highway. The driver of the car, stopped at a traffic light, initiated a high speed chase by accelerating away from a police car. During the ensuing chase, police called for assistance. Highway patrol officers set up a "deadman" roadblock, consisting of an unlighted police car parked laterally in the middle of the highway just over the crest of a hill. As the driver's car reached the top of the hill, police flashed a spotlight into the driver's eyes, blinding him and causing him to crash into the roadblock.

In *Jamieson*, the Fifth Circuit reversed the district court's decision dismissing the plaintiff's fourth amendment claim without leave to amend. The Fifth Circuit found that "[the plaintiff] was 'seized' for purposes of the Fourth Amendment when the officers deliberately placed the roadblock in front of the car in which they knew she was a passenger." *Id.* at 1210.

The majority opinion attempts to distinguish cases, such as *Jamieson*, that involve fourth amendment claims brought by persons for whom the roadblock was not intended. If there is a valid distinction between the cases, it cuts in favor of allowing Brower's survivors to bring a claim. In *Jamieson*, the court found that a person who was *not* the target of a police roadblock could state a fourth amendment claim. In this case, however, Brower *was* the target. Indeed, this case is a clearer example of a

"seizure" because the police actually intended to apprehend the victim of the roadblock—Brower.

Contrary to what the majority opinion suggests, *Galas v. McKee*, 801 F.2d 200 (6th Cir. 1986), is not analogous to the case before this court. In *Galas*, officers were engaged in high speed pursuit of a fleeing motorist. A roadblock was not involved. The pursuit ended when the motorist lost control of his automobile and crashed off the side of the road.

The Sixth Circuit found that the motorist had not been "seized" because the officers did not cause his accident. The court reasoned that "[o]nly when [an] officer, *by means of physical force or show of authority*, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Id.* at 203 (quoting *Terry*, 392 U.S. at 19 n.2)(emphasis added). In *Galas*, "[t]here was no exercise of physical force . . . [nor was the motorist] restrained by . . . the officer's show of authority." *Id.* The motorist crashed because of his inability to maneuver at the high speeds of the chase.

Unlike the police officers in *Galas*, the police in this case *did* restrain Brower's freedom to leave. The police caused Brower to crash by setting up a roadblock to stop him.

Because the roadblock used to stop Brower constituted the use of physical force by police to apprehend a fleeing suspect, I would hold that the roadblock operated to "seize" Brower for purposes of the fourth amendment.

2. Reasonableness

Because I would hold that the roadblock "seized" Brower, I would reach the question whether police accomplished the "seizure" in an unreasonable manner.

The fourth amendment requires that "searches" and "seizures" be reasonable. "Reasonableness" depends on not only the justifications for a particular intrusion, but also on how the intrusion is carried out. *Garner*, 471 U.S. at 7-8.

In *Garner*, the Supreme Court found that "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the

circumstances, is constitutionally unreasonable." *Id.* at 11. The Court held that when a suspect poses no immediate threat to officers or the public, the harm resulting from the failure to apprehend the suspect does not justify the use of deadly force. However, the Court noted that the use of deadly force was not per se unreasonable. When officers have probable cause to believe that a suspect poses a significant threat to public safety, the Court suggested that the use of deadly force might be reasonable:

> [I]f the suspect threatens [an] officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, *where feasible, some warning has been given." Id.* at 11-12. (emphasis added).

In this case, the district court ruled that as a matter of law the roadblock the Inyo police officers used to apprehend Brower was not an unreasonable use of deadly force. The court noted that the high speed chase posed a substantial threat to the officers and the public. Thus, the court concluded that the roadblock was a reasonable response to the perceived dangers of the chase.

The district court also found that Brower was warned of the existence of the roadblock by the police car that officers parked in the middle of the highway. The court stated that it was not required to accept as true the plaintiffs' allegation that the police car headlights blinded Brower and prevented him from seeing the tractor-trailor. "It is not alleged," the court observed, "that [Brower] survivied the collision long enough to so inform anyone of this."

This finding is improper. The fact that Brower is no longer living does not preclude finding that police "effectively concealed" the roadblock as the plaintiffs allege. The accident scene can be re-created and expert testimony can be offered to show that Brower was unable to see the roadblock before he crashed. The plaintiff's allegation that Brower could not see the roadblock was a factual allegation that the district court was required to accept as true for purposes of the motion to dismiss. *Plaine v. McCabe,* 797 F.2d 713, 723 (9th Cir. 1936).

The plaintiff's complaint, properly construed, indicates that police may have failed to give Brower adequate warning of the roadblock, as required by *Garner*. 471 U.S. at 11-12. Therefore, the plaintiffs should be entitled to show at trial whether Brower could in fact have seen the roadblock before he crashed.

If the Inyo police officers set up the roadblock so that Brower, after seeing it, could not have stopped in time to avoid a crash, the roadblock could constitute an unreasonable use of deadly force in violation of Brower's fourth amendment rights. Roadblocks are appropriate devices for police to use in apprehending dangerous criminals. A fleeing felony suspect poses a grave danger. However, the mere presence of danger does not entitle the police to employ any type of roadblock, especially one that could be expected to cause the suspect's death. As the Supreme Court observed in *Garner*, "[i]t is not better that all felony suspects die than that they escape." *Garner*, 471 U.S. at 11. A police roadblock that is designed to lead a fleeing suspect to his death, in my view, constitutes an unreasonble use of deadly force and violates the fourth amendment.

For these reasons, I would reverse the district court's decision to dismiss the plaintiff's fourth amendment claim.

Appendix B

United States District Court
Eastern District of California

No. CV-F-85-265 REC

Georgia Brower, individually and
as administrator of the Estate Of
William James Caldwell (Brower);
William James Caldwell (Brower),
Decedent; Scott Daniel King, a minor;
Renee King, individually and as
Guardian ad litem for Scott Daniel King,
Plaintiffs,

v.

County of Inyo, Inyo County Sheriff's
Department, Donald Dorsey, Craig Oyster,
Reginal Sides, James N. Holmgren, Missouri
Nebraska Express and Tractor Lease, Inc.,
Defendants.

[Filed Oct. 22, 1985]

DECISION AND ORDER

On October 7, 1985, the court heard the motion to dismiss the first amended complaint filed by defendants County of Inyo, Inyo County Sheriff's Department, Donald Dorsey, Craig Oyster, and Reginal Sides (hereinafter referred to collectively as Inyo County). Upon due consideration of the written and oral arguments by the parties, the court enters its order granting the motion for the reasons set forth herein.

Before reaching the merits of the arguments raised by the parties, the court notes a couple of matters upon which dismissal for failure to state a claim is appropriate. Paragraph 1 of the first amended complaint alleges that "[t]his action arises under the Civil Rights Act of 1871 (42 USC 1983, 1985 and 1988) as hereinafter more fully appears, and the Fourth, Fifth and Fourteenth Amendments to the United States Constitution." The only section of Section 1985 which can conceivably apply to this action

is Section 1985(3) which proscribes a conspiracy to deprive any person of the equal protection of the laws or the equal privileges and immunities under the laws. However, Section 1985 is "limited in its coverage to conspiracies motivated by 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus.'" *Blevins v. Ford*, 572 F.2d 1336, 1338 (9th Cir. 1978). Plaintiffs have made no such allegations. Thus, to the extent the first amended complaint is based on a violation of Section 1985, it is dismissed. Furthermore, plaintiffs' allegations of deprivations of the due process clause of the Fifth Amendment are improper. The due process clause of the Fifth Amendment applies only to the federal government. *Flowers v. Webb*, 575 F.Supp. 1450, 1456 (E.D.N.Y. 1983).

Paragraph 21 of the first cause of action of the first amended complaint alleges that defendants "... deprive[d] DECEDENT of his life and liberty as would shock the conscious in violation of his rights to same and guaranteed by the Fourth (4th) ... Amendment .... Said defendants ... also deprived DECEDENT of his right not to be deprived of life and liberty without due process of law as guaranteed by the Fourth ... and Fourteenth ... Amendments ...."

Defendants move for dismissal in connection with the allegations that decedent's rights under the Fourth Amendment have been violated on the grounds that the first amended complaint does not allege the use of deadly force against a fleeing felon or unreasonable actions. In pertinent part, the Fourth Amendment provides: "The right of the people to be secure in their persons ... against unreasonable ... seizures, shall not be violated ...." In determining whether plaintiffs have stated a claim under the Fourth Amendment, the court has reviewed *Tennessee v. Garner*, ___ U.S. ___, 85 L.Ed.2d 1 (1985) in which the Supreme Court held in a civil action pursuant to Section 1983 that the police use of deadly force to prevent the escape of an apparently unarmed suspected felon violated the Fourth Amendment. In so ruling, the Supreme Court affirmed the Sixth Circuit's reversal of the district court's judgment following a bench trial. It should be noted that in *Tennessee v. Garner*, a police officer shot the youth in order to prevent his escape from the scene of a burglary, even

though he did not appear to be armed. The court has some question whether a roadblock constitutes the use of deadly force so as to state a cause of action under the Fourth Amendment. Plaintiffs cite no cases and the court can find none involving the establishment of a roadblock in the course of a high speed chase over a lengthy distance.

However, assuming *arguendo* that the establishment of a roadblock constitutes the use of deadly force, the court concludes as a matter of law that the roadblock alleged to have been established here was not an unreasonable use of deadly force so as to violate the Fourth Amendment. It is conceded for the purpose of this motion that the County of Inyo had probable cause to detain the decedent. Thereupon followed a high speed chase on a public highway, the high speed chase occurring over approximately twenty miles between two communities. The substantial threat to the chasing officers, other drivers and passersby caused by the decedent, a fleeing felon, is obvious. To respond to this threat by establishing a roadblock is not unreasonable under the circumstances. Decedent was warned of the existence of the roadblock by a police vehicle parked in the *middle of the highway* facing the decedent approximately 200 feet ahead of the roadblock.[1]

Having concluded that the first amended complaint does not state a claim for violation of the Fourth Amendment, the court further concludes as a matter of law that decedent's right to substantive due process has not been violated. The acts alleged do not "offend those canons of decency and fairness which express the notions of English speaking peoples even toward those charged with the most heinous offense" of "shock the conscience," so as to violate the substantive due process guarantees "implicit in the concept of ordered liberty." *Palko v. Connecticut,*

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[1] The court has some reservation that it is required to accept as true the allegation that the police car's lights "blinded" decedent, thereby preventing him from seeing the truck constituting the roadblock. It is not alleged that the decedent survived the collision long enough to so inform anyone of this. *See* Wright and Miller, 5 Federal Practice and Procedure, § 1357, pp. 595-96 (1969).

302 U.S. 319, 325 (1937); *Rochin v. California*, 342 U.S. 165, 169 (1952).

Finally, the first amended complaint realleges a deprivation of procedural due process, a cause of action the court had previously dismissed in its order filed July 11, 1985. Form plaintiffs' brief in connection with this motion to dismiss, it appears that plaintiffs are requesting the court to reconsider its previous dismissal based on *Parratt v. Taylor*, 451 U.S. 527 (1981). Plaintiffs argue that California Code of Civil Procedure § 377 is a remedy for wrongs against a decedent's surviving heirs and does not provide a remedy for the decedent's alleged deprivation of life and liberty. However, the court is persuaded that the validity, if any, of this argument is dependent upon the beneficiaries of decedent's estate (i.e. by testate succession) being different from the surviving heirs entitled to bring a wrongful death action. When questioned about this at oral argument, plaintiffs were unable to inform the court of any difference. Accordingly, the court declines to reconsider its previous order and again dismisses plaintiffs' claim for deprivation of procedural due process.

Accordingly, the first cause of action is dismissed. The second cause of action, before this court by reason of pendent jurisdiction, is therefore dismissed without prejudice.

DATED: October 21, 1985.

's/ ROBERT E. COYLE
Robert E. Coyle
United States Disctrict Judge

Appendix C

United States District Court
Eastern District of California

No. CV-F-85-265 REC

Georgia Brower, individually and
as administrator of the Estate of
William James Caldwell (Brower);
William James Caldwell (Brower), Decedent;
Scott Daniel King, a minor; Renee King,
individually and as guardian ad litem for
Scott Daniel King,
Plaintiffs,

vs.

County of Inyo, Inyo County
Sheriff's Department, Donald Dorsey, Craig Oyster,
Reginal Sides, James N. Holmgren,
Missouri Nebraska Express and
Tractor Lease, Inc.,
Defendants.

[Filed Oct. 22, 1985]

DECISION AND ORDER

On October 7, 1985, the court heard the motion to dismiss the first amended complaint filed by defendants James N. Holmgren, Missouri-Nebraska Express, Inc., and Tractor Leasing, Inc. Upon due consideration of the written and oral arguments by the parties, the court enters its order granting defendants' motion for the reasons set forth herein.

A. Statement of Claim Against Missouri-Nebraska Express, Inc. and Tractor Leasing, Inc.

The court agrees with Missouri-Nebraska Express, Inc. and Tractor Leasing, Inc. that the Section 1983 cause of action should be dismissed against them. Missouri-Nebraska Express, Inc. is alleged to be the employer of James N. Holmgren. Tractor Leasing, Inc. is alleged to be a Missouri corporation doing business in California. There are no other allegations specifically pertaining to Tractor Leasing, Inc. Other than by virtue of legal

status and conclusory allegations of joint and concerted action, these defendants are not alleged to have had any involvement in the actions set forth in the first amended complaint. This is not sufficient to state a claim for relief under Section 1983. *Ibarra v. Las Vegas Metropolitan Police Department*, 572 F.Supp. 563, 563-565 (D.Nev. 1983).

B. Absolute Immunity

Defendants argue that they are entitled to absolute immunity from any civil liability for any harm resulting from their cooperation with a law enforcement officer's request for assistance in maintaining the roadblock.

This assertion is based in part on the premise that "[t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities [when it enacted Section 1983]." *Pierson v. Ray*, 386 U.S. 547, 554 (1967). In addition, defendants refer the court to several California decisions which have accorded immunity in actions for false arrest and imprisonment to persons who answer the call of a police officer to assist in making an arrest. *Peterson v. Robison*, 43 Cal.2d 690, 697 (1954); *Garcia v. Gomez*, 112 C.A.3d 392, 398-99 (1980); *Sokol v. Public Utilities Commission*, 65 Cal.2d 247, 256-57 (1966). In addition, defendants refer the court to *Kagel v. Brugger*, 119 N.W. 2d 394, 396-399 (Wis. 1963).

Plaintiffs, citing *Forro Precision, Inc. v. Intern. Business Machines*, 673 F.2d 1045, 1053-1054 (9th Cir. 1982), argue that the decisions relied upon by defendants do not automatically entitle defendants to absolute immunity because the reasonableness of the officers' request and the reasonableness of the implementation of the roadblock present questions of fact to be resolved by the jury.

However, the court is persuaded that *Kagel* controls resolution of this portion of defendants' motion. Thus, the question is whether Holmgren was directed by the officers to place the truck across the back of the curve or whether Holmgren exercised his own judgment in the placement of the truck. While the first amended complaint generally alleges agency and conspiracy, it is silent with regard to the actual participation of the various

defendants. However, in the "Statement of Case" in plaintiffs' opposition to the motions, it is stated: "Deputy OYSTER radioed ahead to Deputy SIDES who commandeered an eighteen-wheel tractor-trailer rig and ordered the driver to block both the northbound and southbound lanes. (There was only a single lane in each direction.) Said tractor-trailer rig was placed behind a curve without illumination." Plaintiffs were unable at oral argument to state any facts that Holmgren exercised any discretion in the establishment of the roadblock. Consequently, the court concludes that defendants are entitled to the absolute immunity sought.

ACCORDINGLY, IT IS ORDERED that the motion to dismiss the first amended complaint is granted and that defendants James N. Holmgren, Missouri-Nebraska Express, Inc., and Tractor Lease, Inc. are dismissed from this action.

DATED: October 21, 1985.

/s/ ROBERT E. COYLE
Robert E. Coyle
United States Disctrict Judge

Appendix D

Judgment In A Civil Case

United States District Court

Eastern District of California at Fresno

CV-F-85-265-REC

Name of Judge or Magistrate
Robert E. Coyle

Georgia Brower, et al

v.

County of Inyo, et al

☒ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

It Is Ordered And Adjudged

that the motion to dismiss the first amended complaint is granted and that defendants James N. Holmgren, Missouri-Nebraska Express, Inc., and Tractor Lease, Inc. are dismissed from this action.

the first cause of action is dismissed. The second cause of action, before this court by reason of pendent jurisdiction, is therefore dismissed without prejudice.

Filed Oct. 23, 1985
Clerk: J.R. Grindstaff

OPPOSITION

BRIEF

No. 87-248

In The

Supreme Court of the United States

October Term, 1987

GEORGIA BROWER, individually and as Administrator of the ESTATE OF WILLIAM JAMES CALDWELL (BROWER); WILLIAM JAMES CALDWELL (BROWER), Decedent; SCOTT DANIEL KING, a minor; RENEE KING, individually and as Guardian ad Litem for SCOTT DANIEL KING,

Petitioners,

v.

COUNTY OF INYO, INYO COUNTY SHERIFF'S DEPARTMENT, DONALD DORSEY, CRAIG OYSTER and REGINAL SIDES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

GREGORY L. JAMES,
County Counsel
PHILIP W. MCDOWELL,
Assistant County Counsel
County of Inyo
P. O. Box 428
Independence, CA 93526
(619) 878-2411
Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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TABLE OF AUTHORITIES

The respondents, COUNTY OF INYO, *et al.*, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case.

I

THERE IS NO CONFLICT WITH A DECISION OF THIS COURT

The petitioners claim that the decision below is in conflict with *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694 (1985). *Tennessee v. Garner*, held that the use of deadly force by police to apprehend a fleeing suspect was a seizure that was actionable under the Fourth Amendment, if the use of force was unreasonable. The Court found that the shooting of a non-dangerous fleeing suspect by a police officer constituted such an unreasonable seizure. *Tennessee v. Garner* in no way addressed the issue of roadblocks as constituting either a use of force or a seizure. The decision below applied the *Tennessee v. Garner* standard and found that under the facts alleged, the petition failed to set forth a Fourth Amendment seizure.

II

THERE IS NO CONFLICT AMONGST THE CIRCUITS

The petitioner claims that the decision below is in conflict with *Jamieson v. Shaw*, 772 F.2d 1205 (1985). While the allegations of both cases are similar, they contain significant differences. The *Jamieson* court found that the allegations supported a deathtrap or "deadman" roadblock; that is a roadblock where the pursued driver had no warning and, therefore, no choice but to collide with the roadblock. The 9th Circuit in the decision below distin-

guished *Jamieson* on its facts. Inherent in the 9th Circuit's decision is that the facts alleged by the petitioners did not support a finding that the driver lacked such a choice.

The petitioners, while attempting to allege a "deadman" roadblock, stated facts that both the District Court and the Court of Appeals found were contrary to the making of a successful Fourth Amendment seizure claim. The petitioners alleged that the roadblock was unilluminated and concealed "behind" a curve and, also, that a police vehicle with its headlights on and shining into the path of the decedent's vehicle was parked 200 feet ahead of an 18-wheel truck and trailer. It was further alleged that the decedent drove past the parked, illuminated police vehicle before striking the much larger 18-wheel truck and trailer. Petitioners' allegation that there was a concealed and unilluminated roadblock is inconsistent with their allegation that the roadblock was marked by a police vehicle in the middle of the two lane highway with its lights on. Petitioners do not dispute that the clearly visible and illuminated police vehicle was as much a component of the roadblock as was the truck and trailer.

The petitioners allege that the headlights of the police vehicle "blinded" the decedent. If, as alleged, the decedent was "blinded" by the stationary headlights of the police vehicle in the roadway, then as is inherent in the decision below, that was a condition that the decedent could have chosen to avoid. There is no allegation that the headlights of the police vehicle caused any greater danger than any other vehicle the decedent confronted on the highway that evening.

While the 9th Circuit had some difficulty with the holding of the 5th Circuit Court of Appeals in the *Jamieson* case, its decision does not conflict with that holding. Unlike the facts in the *Jamieson* case, the 9th Circuit found that the facts alleged in the instant case did not demonstrate that the decedent was deprived of a choice in either recognizing the roadblock or in choosing how to deal with the roadblock.

The 9th Circuit followed the lead in the analogous case of *Galas v. McKee,* 801 F.2d 200 (1986) which held that "by engaging in high speed pursuits, without more, police use absolutely no force." (*Galas, supra,* p. 203.) It is the application of force by police in apprehending a fleeing suspect that is required to make a seizure actionable under the Fourth Amendment according to the ruling in *Tennessee v. Garner.* When a roadblock is marked as in this case, it is the fleeing suspect who chooses to apply force, and not the police, by failing to heed the consequences of a roadblock.

III

THE FACT THAT THE COURT OF APPEALS DID NOT DISCUSS THE ISSUE OF REASONABLENESS IS NOT GROUNDS TO GRANT THE PETITION FOR CERTIORARI

The 9th Circuit indeed did not need to discuss whether reasonable force was used since it held there was no seizure. This holding was based on its inherent findings that it was the decedent who chose to apply the force and not the police and that the roadblock was reasonable because it was established in such a way as to offer the decedent a choice. Under these circumstances the petitioners,

in reality, are asking this Court to scrutinize the unpublished Order of the District Court in deciding whether to grant certiorari. Such a request is not within the usual consideration for review under Supreme Court Rule 17.

IV

THE PETITIONER HAS AN ADEQUATE REMEDY UNDER THE FOURTEENTH AMENDMENT ALLEGATION REINSTATED BY THE COURT OF APPEALS

The 9th Circuit Court of Appeals restored the petitioners' substantive and procedural due process cause of action under the Fourteenth Amendment. That cause of action is based upon the same allegations as the petitioners alleged to support his Fourth Amendment seizure theory. Additionally, the petitioners may amend their complaint when and if they can show to the trial court further sufficient allegations or proof to support a Fourth Amendment violation (F.R.C.P. 15[a][b]).

—o—

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

GREGORY L. JAMES,
County Counsel
PHILIP W. MCDOWELL,
Assistant County Counsel
County of Inyo
P. O. Box 428
Independence, CA 93526
(619) 878-2411
Counsel for Respondents

JOINT

APPENDIX

(3)

No. 87-248

In The

Supreme Court of the United States

October Term, 1988

GEORGIA BROWER, individually and as Administrator of the ESTATE OF WILLIAM JAMES CALDWELL (BROWER); WILLIAM JAMES CALDWELL (BROWER), Decedent; SCOTT DANIEL KING, a minor; RENEE KING, individually and as Guardian ad Litem for SCOTT DANIEL KING,

Petitioners,

v.

COUNTY OF INYO, INYO COUNTY SHERIFF'S DEPARTMENT, DONALD DORSEY, CRAIG OYSTER, and REGINAL SIDES,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

ROBERT G. GILMORE*
Gilmore & Hancock
470 E. Herndon, Suite 201
Fresno, CA 93710
Counsel for Petitioners

CRAIG DIAMOND
Shine, Browne & Diamond
434 Colfax Avenue
Grass Valley, CA 95945
Counsel for Petitioner

LINDA J. ZACHRITZ
Attorney At Law
1111 Fulton Mall, Suite 615
Fresno, CA 93721
Counsel for Petitioner

GREGORY L. JAMES
PHILIP W. McDOWELL*
Inyo County Counsel
P.O. Box 428
Independence, CA 93526
Counsel for Respondents

*Counsel of Record

Petition for Writ of Certiorari Filed August 13, 1987
Certiorari Granted June 27, 1988

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or call collect (402) 342-2831

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RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1985		
5- 3	1	Cmplnt, iss'd sums & ret'd
	2	Petition for appointment of guardian ad litem
	3	Order appointing guardian ad litem (REC)
6- 4	5	Ntc of Mtn & Mtn to Dismiss; Memo of Pts. & Auth. for 07/08/85 @ 1:30 b/4 REC
6-21	6	Pltfs P/A in oppos to the mtn to dismiss brought by defts County of Inyo, Inyo County Sheriffs dept, Donald Dorsey, Craig Oyster & Reginal Sides
7- 1	7	P/A in response to pltfs P/A in oppos to mtn
7- 8	8	MINUTES: defts county of inyo mtn to dismiss is granted, pltf granted 30 days to file amended cmplnt
7-11	9	ORDER: Mtn to Dismiss Cmplnt—Pltfs' first cause of action is dismissed w/leave to amend; Pltfs' 2nd cause is dismissed w/prejudice; Pltfs' 3rd cause is dismissed w/o prejudice. Ptlfs granted 30 days from date of hrg 7-8-85 in which to amended their cmplnt (REC).
8- 1	10	1st amended cmplnt & demand for jury trl
8-21	13	Defts ntc of mtn & mtn to dismiss, memo of P/A 10-7-85 at 1:30 pm B/4 REC
	14	Ntc of mtn & mtn to dismiss 10-7-85 at 1:30 pm B/4 REC
	15	Memo of P/A in supt of mtn to dismiss
9-24	16	POINTS & AUTHORITIES in opp to the mot to dism brought by every named deft
10- 4	17	Dfts Obj to Pltf P/A in Opp to Mtn to Dismss.

10-22	19	DECISION & Ord, mtn to dism 1st amd comp is granted defts James N. Holmgren, Missouri-Nebraska Express & Tractor Lease are dism from action (REC)
	20	DECISION & Ord, 1st cause of action is dism, 2nd cause of action is dism w/o prej (REC)
	21	JUDGMENT JS-6
11-20	22	NOTICE of appeal by pltfs
11-25		CASE info to 9th Cir w/cpy of appeal not, docket fee pmt & docket

ROBERT G. GILMORE #82136
GILMORE & HANCOCK
A Professional Law Corporation
5363 N. Fresno, Suite 108
Fresno, California 93710
(209) 224-7900

CRAIG DIAMOND
SHINE, BROWN & DIAMOND
434 Colfax Avenue
Grass Valley, California 95945
(916) 272-4204

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

GEORGIA BROWER, individually and as administrator of the ESTATE OF WILLIAM JAMES CALDWELL (BROWER); WILLIAM JAMES CALDWELL (BROWER); Decedent; SCOTT DANIEL KING, a minor; RENEE KING, individually and as Guardian ad litem for SCOTT DANIEL KING,	Case No. CV-F-85-265 REC
Plaintiffs,	FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL
vs.	
COUNTY OF INYO, INYO COUNTY SHERIFF'S DEPARTMENT, DONALD DORSEY, CRAIG OYSTER, REGINAL SIDES, JAMES N. HOLMGREN, MISSOURI NEBRASKA EXPRESS and TRACTOR LEASE, INC.,	(Civil Rights, and Wrongful Death)
Defendants.	(Filed Aug. 1, 1985)

GENERAL ALLEGATIONS

1. This action arises under the Civil Rights Act of 1871 (42 USC 1983, 1985 and 1988) as hereinafter more fully appears, and the Fourth, Fifth and Fourteenth Amendments to the United States Constitution. This court has jurisdiction under 28 USC Sections 1331 and 1343.

2. The matter in controversy exceeds $10,000.00 exclusive of interests and costs.

3. Jurisdiction over claims for relief sounding in tort is conferred on this court by the doctrine of ancillary and pendent jurisdiction.

4. Defendant COUNTY OF INYO, is a governmental entity in the State of California with whom a claim was filed on December 10, 1984, and with whom an amended claim was filed on December 14, 1984, requesting an award of damages in the matter set forth in this complaint. The claim was denied by the Inyo County Board of Supervisors on February 13, 1985.

5. At all times herein mentioned, WILLIAM JAMES CALDWELL (BROWER), hereinafter "DECEDENT", was, prior to his death on October 23, 1984, a minor, and a citizen of the United States, residing at 10590 Brower Drive, Rough and Ready, County of Nevada, California.

6. At all times herein mentioned plaintiff, GEORGIA BROWER, was and now is a citizen of the United States and resides at 10590 Brower Drive, Rough and Ready, County of Nevada, California. Plaintiff, GEORGIA BROWER, was appointed Personal Representative of the Estate of WILLIAM JAMES BROWER on April 1, 1985, in Nevada County, California, Case No. 9920.

7. At all times herein mentioned, plaintiff SCOTT DANIEL KING is the natural child of DECEDENT and plaintiff, RENEE KING.

8. The heirs at law of the DECEDENT and their relationship to the DECEDENT are:

NAME	RELATIONSHIP
GEORGIA BROWER	Mother
SCOTT DANIEL KING	Child
RENEE KING	Fiancee'

9. At all times herein mentioned, the defendant, COUNTY OF INYO, was and now is a county within the State of California and within the jurisdiction of this judicial district.

10. Defendants, INYO COUNTY SHERIFF'S DEPARTMENT, is a law enforcement agency acting under the authority of defendant, INYO COUNTY.

11. At all times herein mentioned defendant, DONALD DORSEY, was and now is the Sheriff and resident of the defendant, COUNTY OF INYO.

12. At all times herein mentioned defendants, CRAIG OYSTER and REGINAL SIDES, were and now are Deputy Sheriffs of defendant, INYO COUNTY SHERIFF'S DEPARTMENT, and residents of defendant, COUNTY OF INYO.

13. Defendant, MISSOURI-NEBRASKA EXPRESS, is a trucking business incorporated in Missouri which is licensed to do business in California with its principal place of business and agent for service of process in Los

Angeles, California and which was doing business in the State of California, County of Inyo, on or about October 23, 1984.

14. Plaintiff is informed, believes and thereon alleges that at all times herein mentioned defendant, JAMES M. HOLMGREN, was and now is a resident of Kansas City, Missouri and at all times herein mentioned was an employee of defendant MISSOURI-NEBRASKA EXPRESS.

15. Plaintiff is informed, believes and thereon alleges that at all times herein mentioned defendant, TRACTOR LEASE, INC., was and now is a Missouri Corporation doing business in the State of California.

16. Plaintiffs are informed, believe and thereon allege that at all times herein mentioned, defendants, and each of them, were the agents and employees of each of the remaining defendants and were acting within the course, scope and purpose of such agency and employment and conspired among each other in doing all things herein alleged.

17. Plaintiffs are informed, believe and thereon allege that defendants, DONALD DORSEY, CRAIG OYSTER and REGINAL SIDES are law enforcement officers and employed as such with defendant, INYO COUNTY SHERIFF'S OFFICE, and in doing all of the things hereinafter mentioned, acted under color of their authority as such and under color of the statutes, regulations, customs and usages of the defendants, INYO COUNTY SHERIFF'S DEPARTMENT, COUNTY OF INYO and State of California and pursuant to the official policy of

defendants, DONALD DORSEY, INYO COUNTY SHERIFF'S DEPARTMENT and COUNTY OF INYO.

18. Plaintiffs are informed, believe and thereon allege that in doing all of the things herein alleged, defendants, and each of them, acted under color of statutes, regulations, customs and usages of the COUNTY OF INYO and State of California and pursuant to the official policy of defendants, DONALD DORSEY, INYO COUNTY SHERIFF'S DEPARTMENT and COUNTY OF INYO, and that defendants, and each of 'hem, assisted, cooperated, coordinated and acted in concert with each of the other defendants.

FIRST CAUSE OF ACTION

(Civil Rights Violation)

As a First Cause of Action against defendants, and each of them, plaintiff GEORGIA BROWER, in her representative capacity on behalf of DECEDENT, alleges:

19. GEORGIA BROWER, individually and as Personal Representative of the Estate of WILLIAM JAMES CALDWELL (BROWER), refers to the allegations contained in paragraphs 1 through 18 of the GENERAL ALLEGATIONS above and incorporates them herein as though fully set forth anew.

20. On the night of October 23, 1984, at approximately 11:15 p.m., defendant, CRAIG OYSTER, while on duty in his marked police vehicle, pursued DECEDENT in a high speed chase southbound on Highway 395 from the City of Lone Pine, County of Inyo, to the City of Cartago, also in the County of Inyo, a distance of approxi-

mately twenty miles. Said pursuit allegedly resulted from defendant OYSTER's belief that DECEDENT was in possession of a stolen vehicle.

21. During the course of said pursuit, defendants, and each of them, conspired to and in fact did deprive DECEDENT of his life and liberty as would shock the conscious in violation of his rights to same and guaranteed by the Fourth (4th) and Fifth (5th) Amendments to the United States Constitution. Said defendants and each of them also deprived DECEDENT of his right not to be deprived of life and liberty without due process of law as guaranteed by the Fourth (4th), Fifth (5th) and Fourteenth (14th) Amendments of the United States Constitution. All of said rights of DECEDENT, as set forth herein, were violated by defendants and each of them by the use of brutal, excessive, unreasonable and unnecessary physical force upon the person of DECEDENT, as more specifically set forth herein. More specifically, said defendants and each of them violated DECEDENT's rights, as set forth herein, by obtaining an 18-wheel tractor-trailer vehicle operated by defendant JAMES N. HOLMGREN and owned by MISSOURI-NEBRASKA EXPRESS and TRACTOR LEASE, INC., and caused same to be placed across Highway 395, late at night, completely blocking both the northbound and southbound lanes. Said defendants effectively concealed said truck from DECEDENT's view by parking same behind a curve, failing and refusing to illuminate same and "blinding" DECEDENT by parking a police vehicle in the center of the highway between said truck and DECEDENT's approaching vehicle. Said police vehicle had its headlamps shining directly into DE-

CEDENT's eyes as he approached. In his "blinded" state DECEDENT drove past said police vehicle totally unaware of the presence of the tractor-trailer vehicle and collided into said vehicle causing severe injuries to DECEDENT. DECEDENT lived for some unknown period of time following the collision, however, he subsequently died from the injuries. Plaintiffs are informed, believe and thereon allege that defendants, COUNTY OF INYO, INYO COUNTY SHERIFF'S DEPARTMENT, DONALD DORSEY, CRAIG OYSTER and REGINAL SIDES utilized the above method of detaining and apprehending DECEDENT pursuant to a policy and procedure of defendants' INYO COUNTY and INYO COUNTY SHERIFF'S DEPARTMENT, which policy and procedure authorized and permitted such a method of apprehension in all cases and instances where individuals attempt to evade arrest without consideration of the degree or nature of the wrongful conduct for which the fleeing subject is allegedly sought and without regard to the Constitutional rights of life, liberty and due process of the fleeing individuals.

22. As a proximate result of the conduct of defendants, and each of them, as set forth herein, the DECEDENT suffered mental, physical and emotional pain and suffering resulting in his death and was deprived of his United States Constitutional substantive rights of life, liberty and due process, all to DECEDENT's damages in the sum of TWO MILLION DOLLARS ($2,000,000.00).

23. The conduct of defendants, DONALD DORSEY, CRAIG OYSTER, REGINAL SIDES, MISSOURI-NEBRASKA EXPRESS, JAMES M. HOLMGREN and

TRACTOR LEASE, INC. was willful, wanton, malicious and one with an evil motive and intent and a wreckless disregard for the rights and safety of the DECEDENT and therefore warrants the imposition of exemplary and punitive damages in the sum of ONE MILLION DOLLARS ($1,000,000.00) as to each of said defendants.

WHEREFORE, plaintiff prays for relief as hereinafter provided:

SECOND CAUSE OF ACTION

(Negligence-Wrongful Death)

As and for a Second Cause of Action, plaintiffs, GEORGIA BROWER, individually, SCOTT DANIEL KING, a minor and RENEE KING complain of defendants and each of them and allege as follows:

24. Plaintiffs refer to the allegations contained in paragraphs 1 through 18 of the GENERAL ALLEGATIONS and paragraphs 19 through 23 of the First Cause of Action and by this reference incorporate them herein as though fully set forth anew.

25. Defendants and each of them were negligent and careless in establishing the roadblock in the manner described above proximately resulting in the death of WILLIAM JAMES CALDWELL (BROWER) on October 23, 1984.

26. As a proximate result of the negligence of defendants and each of them, and of the death of DECEDENT, DECEDENT's heirs have sustained pecuniary loss resulting from the loss of his society, comfort, attention,

services and support in the sum of FOUR MILLION DOLLARS ($4,000,000.00).

27. As a further proximate result of the negligence of defendants and each of them, and of the death of DECEDENT, DECEDENT's heirs have incurred funeral and burial expenses in the approximate sum of ONE HUNDRED DOLLARS ($100.00).

WHEREFORE, plaintiff prays judgment as follows:

As to the First Cause of Action:

1. Compensatory damages in the sum of TWO MILLION DOLLARS ($2,000,000.00);

2. Punitive damages in the sum of ONE MILLION DOLLARS as against only the following defendants:

(a) DONALD DORSEY

(b) CRAIG OYSTER

(c) REGINAL SIDES

(d) JAMES M. HOLMGREN

(e) MISSOURI-NEBRASKA EXPRESS

(f) TRACTOR LEASE, INC.

3. For costs of suit incurred herein;

4. For reasonable attorney's fees; and

5. For such other and further relief as the court may deem proper.

As to the Second Cause of Action, plaintiffs pray:

1. For special damages in the sum of TWO MILLION DOLLARS ($2,000,000.00);

2. For general damages in the sum of TWO MILLION DOLLARS ($2,000,000.00);

3. For costs of suit incurred herein;

4. For reasonable attorney's fees; and

5. For such other and further relief as the court may deem proper.

DATED: August 1, 1985.

GILMORE & HANCOCK
A Professional Law Corporation

By /s/ R. G. Gilmore
ROBERT G. GILMORE

Attorneys for Plaintiffs

(Proof of Service by Mail 101.3a. 2015.5 C.C.P.)

STATE OF CALIFORNIA,
COUNTY OF FRESNO

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within above entitled action; my business address is:

5363 North Fresno Street, Suite 108, Fresno, CA 93710

On August 1, 1985, *I served the within* FIST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL *on the* interested parties *in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at* Fresno, California *addressed as follows:*

Dennis L. Myers
Box 428
Courthouse
Independence, CA 93526

Daniel P. Lyons
McCormick, Barstow,
Sheppard & Waite
P.O. Box 24013
Fresno, CA 93779-4013

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on August 1, 1985 *at* Fresno, *California*

(date) *(place)*

/s/ Chrissy Freitas
CHRISSY FREITAS (*Signature*)

PETITIONER'S

BRIEF

(4)

No. 87-248

In The

Supreme Court of the United States

October Term, 1988

GEORGIA BROWER, individually and as Administrator of the ESTATE OF WILLIAM JAMES CALDWELL (BROWER); WILLIAM JAMES CALDWELL (BROWER), Decedent; SCOTT DANIEL KING, a minor; RENEE KING, individually and as Guardian ad Litem for SCOTT DANIEL KING,

Petitioners,

v.

COUNTY OF INYO, INYO COUNTY SHERIFF'S DEPARTMENT, DONALD DORSEY, CRAIG OYSTER, and REGINAL SIDES,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

ROBERT G. GILMORE*
GILMORE & HANCOCK
470 East Herndon, Suite 201
Fresno, California 93710
(209) 436-1100
Counsel for Petitioners

CRAIG A. DIAMOND
SHINE, BROWNE & DIAMOND, APC
434 Colfax Avenue
Grass Valley, California 95945
(916) 272-2685
Counsel for Petitioners

LINDA J. ZACHRITZ
Attorney at Law
1111 Fulton Mall, Suite 615
(209) 266-1443
Fresno, California 93721
Counsel for Petitioners

*Counsel of Record

August 22, 1988

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or call collect (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE APPREHENSION OF DECEDENT BY MEANS OF A HIGH SPEED CHASE AND A "DEADMAN" ROADBLOCK CONSTITUTES A SEIZURE WITHIN THE MEANING OF THE FOURTH AMENDMENT.

A. Whether, in terms of the Fourth Amendment, "seizure" encompasses a broader range of action than an actual arrest or physical restraint.

B. Whether the use of a concealed roadblock restrained Decedent's freedom to "leave" and as such constituted a seizure under the Fourth Amendment.

2. WHETHER THE NINTH CIRCUIT COURT OF APPEAL, BY FINDING THAT THE ALLEGED EXCESSIVE FORCE CONSTITUTED A VIOLATION OF SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT, "FOUND" AS A MATTER OF LAW THAT THE SAME CONDUCT CONSTITUTED AN UNREASONABLE SEIZURE UNDER THE FOURTH AMENDMENT.

A. Whether excessive force during arrest is necessarily unreasonable under the Fourth Amendment if it is also violative of substantive due process under the Fourteenth Amendment.

B. Whether the pursuit and the "deadman" roadblock, upon a balancing of the interests of Decedent and respondents, constituted an unreasonable seizure under the Fourth Amendment.

THE PARTIES

Petitioners (plaintiffs below) are Georgia Brower, individually and as Administrator of the Estate of William James Caldwell (Brower); William James Caldwell (Brower), Decedent; Scott Daniel King, a minor; Renee King, individually and as Guardian ad Litem for Scott Daniel King. Respondents (defendants below) are County of Inyo, Inyo County Sheriff's Department, Donald Dorsey, Craig Oyster, and Reginal Sides. The dismissal of defendants Missouri-Nebraska Express and Tractor Lease, Inc. was upheld by the Ninth Circuit Court of Appeals and those defendants are not part of this proceeding. Defendant James N. Holmgren was reinstated into the action by the Ninth Circuit Court of Appeals after dismissal by the District Court, however, was subsequently and voluntarily dismissed by petitioners.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Appendix A to the Petition for Writ of Certiorari—hereinafter "Pet. App. A") is reported at 817 F.2d 540 (9th Cir. 1987). The decision and order as relates to the respondents herein, of the United States District Court for the Eastern District of California filed October 22, 1985, is set forth in Appendix B of the Petition for Writ of Certiorari. The judgment of the United States District Court for the Eastern District of California dismissing petitioner's First Amended Complaint was filed October 23, 1985 and is set forth in Appendix D of the Petition for Writ of Certiorari.

JURISDICTION

The opinion of the Court of Appeals was dated May 15, 1987. The Petition for Writ of Certiorari was filed August 13, 1987, and was granted June 27, 1988. This Court has jurisdiction to review the judgment by Writ of Certiorari pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV, Constitution of the United States:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV, Section 1, Constitution of the United States:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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STATEMENT OF THE CASE

Petitioner filed this damage action in 1985 for wrongful death and civil rights violations based on 42 USC 1983, 1985 and 1988, and the Fourth, Fifth and Fourteenth Amendments to the U.S. Constitution. Jurisdiction of the District Court was invoked under 28 USC Sections 1331 and 1334. (J.A. 3,4)

Petitioners' complaint arises out of defendant's attempts to apprehend WILLIAM JAMES CALDWELL, Decedent, for allegedly possessing a stolen automobile. (J.A. 8) At approximately 11:30 p.m. on the night of October 23, 1984, Decedent, a minor, was being pursued by Inyo County Sheriff's Deputy, CRAIG OYSTER. (J.A. 7) Decedent and OYSTER were driving southbound on

Highway 395, a two-lane highway in Inyo County. Deputy OYSTER pursued Decedent through approximately 20 miles of desert land at which time Deputy OYSTER radioed ahead to Deputy SIDES requesting a roadblock. (J.A. 8) Deputy SIDES ordered the driver of an eighteen-wheel tractor-trailer rig to use his vehicle to block both the north and south bound lanes of Highway 395. The unilluminated tractor-trailer rig was located behind a curve in the highway. The police car of Deputy SIDES was parked in the middle of the highway approximately 200 feet in front of the tractor-trailer rig facing decedent's oncoming automobile. The headlights of Deputy SIDES' vehicle were turned on and shining directly at decedent's approaching vehicle. (J.A. 8) Decedent, proceeding at a high rate of speed, passed the right side of the police car, slammed into the tractor-trailer rig and died a short time after the collision. (J.A. 9)

Decedent is survived by his mother, GEORGIA BROWER, his financee, RENEE KING and his child, SCOTT DANIEL KING, a party to this action by and through plaintiff, RENEE KING. (J.A. 5) On May 3, 1985 petitioners filed their complaint and demand for jury trial in the U.S. District Court for the Eastern District of California. (J.A. 3) On July 8, 1985 a motion to dismiss appellant's action was heard and the Eastern District issued an order dismissing Causes of Action One, Two and Three with leave to amend. (J.A. 1)

On August 1, 1985 petitioners filed their First Amended Complaint upon which respondents filed a motion to dismiss which was heard on October 7, 1985. (Pet. Cert. A-19) On October 22, 1985 the Eastern District ordered that the entire complaint be dismissed as to all defendants. (J.A. 2) The court based its order on findings that the

complaint alleged no constitutional violation including a lack of a violation of substantive due process (Pet. Cert. A-21), that plaintiff was afforded an adequate remedy in state law (Pet. Cert. A-22) and that all non-governmental entities or individuals were protected by absolute immunity from civil liability in this matter. (Pet. Cert. A-25)

On or about November 20, 1985 petitioners filed in the United States Court of Appeals, Ninth Circuit, a notice of appeal from the orders of the Eastern District. (J.A. 2) Argument was heard by the Ninth Circuit on December 10, 1986. The case was submitted on December 29, 1986 and a decision was entered on May 15, 1987. (Pet. Cert. A-1)

In an opinion by Justice Goodwin, Justice Pregerson dissenting, the Ninth Circuit decided that petitioners' Fourteenth Amendment procedural and substantive due process claims, and claims against defendant, JAMES M. HOLMGREN, the driver of the truck, were improperly dismissed and reversed the Eastern District as to those matters remanding the case to the District Court. (Pet. Cert. A-12, 13) The Ninth Circuit further held that the Eastern District properly dismissed petitioners' Fourth Amendment (Pet. Cert. A-10), Fifth Amendment and 42 USC Sections 1985 and 1988 (Pet. Cert. A-8) claims as well as all claims against defendants, MISSOURI-NEBRASKA EXPRESS and TRACTOR LEASE, INC. (Pet. Cert. A-12)

On August 13, 1988 petitioners filed the Petition for Writ of Certiorari in this Court requesting review of the Ninth Circuit's decision to dismiss petitioners' Fourth

Amendment claim. On June 27, 1988 this Court granted plaintiffs' Petition for Writ of Certiorari.

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SUMMARY OF ARGUMENT

Petitioners' First Amended Complaint alleged that petitioners' decedent, age 17, was killed when he attempted to elude police officers in an allegedly stolen vehicle. Decedent, after being chased for approximately twenty miles on a two-lane highway, collided with an eighteen-wheel tractor-trailer vehicle which had been commandeered by the police and set up, in the darkness of the night, as an unilluminated roadblock behind a curve and completely blocking both lanes of the highway.

The Ninth Circuit ruled that the police conduct, as alleged, constituted a violation of decedent's right to substantive due process under the Fourteenth Amendment. However, the Ninth Circuit ruled that this same conduct did not violate the Fourth Amendment proscription against unreasonable search and seizure because the decedent was not "seized" within the meaning of the Fourth Amendment.

This Court has ruled that one is seized within the meaning of the Fourth Amendment when, under all the circumstances, a reasonable person would believe that he or she is not free to ignore the exerted governmental authority and simply walk away. Applying this standard to the present case requires a finding that both the pursuit standing alone and/or in conjunction with the concealed roadblock, constitutes a seizure. The police officers' con-

duct was directed at and resulted in the apprehension of the Decedent, who was not free to simply walk away.

Excessive governmental force may violate either the Fourth Amendment proscription against unreasonable seizures or the Fourteenth Amendment right of substantive due process. When the claimed excessive force occurs in the course of seizing an individual, the excessive force may violate both the Fourth and the Fourteenth Amendment. In determining whether the claimed excessive force violates one or the other of these Amendments, this Court has developed tests or standards to judge whether the manner and method of the force was proper. Petitioners contend that the finding of the Ninth Circuit Court of Appeal that the alleged excessive force herein violated Decedent's right of substantive due process under the Fourteenth Amendment necessitates a finding that the same shocking conduct directed at the apprehension of the Decedent was an unreasonable seizure under the Fourth Amendment.

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ARGUMENT

I.

APPREHENSION OF DECEDENT BY MEANS OF A HIGH SPEED CHASE AND A "DEADMAN" ROADBLOCK CONSTITUTES A SEIZURE WITHIN THE MEANING OF THE FOURTH AMENDMENT.

The Ninth Circuit Court of Appeals ruled in this case that the Decedent was not "seized" within the meaning of the Fourth Amendment. The opinion held that the Decedent's death by colliding into the concealed roadblock

was the result of his own voluntary act and not the result of the Deputy Sheriff's conduct, i.e., the high speed chase and/or the setting up of the roadblock. (Pet. Cert., A-9) Although the petition for certiorari herein points more specifically to the conduct concerning the roadblock, as opposed to the chase leading up to it, petitioners feel compelled by the Ninth Circuit's reasoning and the totality of the circumstances to address both the chase and the roadblock. Petitioners submit that either the high speed chase alone and/or the apprehension of the Decedent by means of the concealed roadblock constitute a "seizure" within the meaning of the Fourth Amendment.

A. In Terms Of The Fourth Amendment, "Seizure" Encompasses A Broader Range Of Action Than An Actual Arrest Or Physical Restraint.

In *Terry vs Ohio*, 392 U.S. 1, 16, 88 S.Ct. 1868 (1968), this Court held that a traditional "arrest" is not necessary for a seizure of the person to occur. Prior to the decision in *Terry*, the functional definition of "seizure" typically required that the police physically restrain a person, in effect make an arrest, for conduct to activate the Fourth Amendment proscriptions against unreasonable seizures. See *State vs. Terry*, 5 Ohio App.2d 122, 214 N.E.2d 114 (1966), cited in *Terry vs. Ohio, supra;* LaFave, Arrest, pp. 348-349, fn 21 (1965). In explaining its analysis, the Court noted that an individual is seized and the protections of the Fourth Amendment apply when a police officer "accosts an individual and restrains his freedom to walk away." *Terry vs. Ohio*, 392 U.S. 1, 16. Standing alone such interpretation of seizure may seem to require that an

individual's freedom to leave be interfered with by means of some physical restraint, although concededly short of an arrest. Later in *Terry,* however, the Court expands on the meaning of seizure in considerably broader terms by stating that a seizure may occur where physical force or a *show of authority* in some way restrains the liberty of an individual. *Terry vs. Ohio,* 392 U.S. 1, 19, fn 16. (emphasis added)

It is clear, after *Terry,* that a formal arrest, or physical restraint is not necessary to invoke the proscriptions of the Fourth Amendment against unreasonable seizures. However, the determination of what pre-arrest governmental action short of an arrest or physical restraint constitutes a seizure has been unclear. Since *Terry,* this Court and the Courts of Appeal, have been called upon to determine whether and to what extent pre-arrest, non-physical contact, i.e., coercion by law enforcement agents, will constitute a seizure.

The most obvious examples of a "show of authority" by police have arisen in the contexts of vehicle stops. In *U.S. vs. Nicholas,* 448 F.2d 622 (8th Cir. 1971), the Eighth Circuit Court of Appeal applied the language of *Terry* in finding that a seizure had occurred when police approached the suspect's parked car, stating:

> Even though Nicholas may have been physically free to drive away when the officers stationed themselves on either side of Nichols' car and flashed their badges, we find that the actions of the officers constituted sufficient show of authority to restrain Nicholas' freedom of movement. *U.S. vs. Nicholas,* 488 F.2d, at 624.

Likewise, this Court has determined that the exercise of police authority in stopping a vehicle upon a public

highway constitutes a seizure. As in *U.S. vs. Brignoni-Ponce,* 422 U.S. 873, 95 S.Ct. 2574 (1975) the Court followed *Terry* in holding that a suspect briefly stopped by a roving border patrol was restrained from walking away and thus "seized" within the meaning of the Fourth Amendment. *U.S. vs. Brignoni-Ponce,* 422 U.S. 873, at 878, citing *Terry vs. Ohio, supra.* To the same effect is the holding of this Court that the very act of stopping a vehicle by the use of flashing lights of a police car is a show of authority resulting in a seizure of the occupants and is subject to the Fourth Amendment limitations. *See U.S. vs. Hensley,* 469 U.S. 221, 226, 105 S.Ct. 675 (1985); *Delaware vs. Prouse,* 440 U.S. 648, 653-655, fn 3 (1979).

In two recent cases not involving vehicle stops, this Court has expressly announced objective tests for determining whether government action short of arrest and/or physical restraint will constitute a seizure within the meaning of the Fourth Amendment. That test has now settled on whether "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Michigan vs. Chesternut,* — U.S. —, 108 S.Ct. 1975, 1979 (1988), quoting *U.S. v. Mendenhall,* 446 U.S. 544, 554, 100 S.Ct. 1870, 1877 (1980). The focus of the test is on the "coercive effect of police conduct, taken as a whole." *Michigan vs. Chesternut,* 108 S.Ct., at 1979.

In *Chesternut,* this Court examined circumstances in which the suspect, standing on a corner, started to run upon seeing the officers' police car. The police did not chase but simply followed the running suspect for a short distance and saw the suspect discard some packets taken

out of his pocket. *Michigan vs. Chesternut,* 108 S.Ct., at 1977. In determining whether the police conduct constituted a seizure, the Court declined the opportunity to adopt either of two tests, each of which would have taken seizure analysis to opposite extremes—that no police conduct short of an apprehension is a seizure, or that all police pursuit constitutes a seizure. The court held that given all of the surrounding circumstances, the officers' conduct "was not 'so intimidating' that respondent could reasonably have believed that he was not free to disregard the police presence and go about his business." *Michigan vs. Chesternut,* 108 S.Ct. at 1981.

In ruling as it did, the Court in *Michigan vs. Chesternut, supra,* relied in part upon its decision in *U.S. vs. Mendenhall, supra,* reasoning that not all government/individual contact will constitute a seizure. In *Mendenhall,* the Court found that a criminal suspect was not seized when she was approached in a concourse of a major airport by two Federal agents who identified themselves as such and asked to inspect her identification and airline ticket. The agents then returned the identification and ticket to the suspect and asked her if she would accompany them to a drug enforcement adminstration office located within the airport. The suspect acquiesced in all of these requests including a subsequent body search that revealed several packets of heroin. The Court ruled that the agents' conduct was not such as would lead a reasonable person to believe that he or she was not free to ignore the agents and simply walk away. The Court stressed the suspect's voluntary and consensual behavior in refuting the suspect's allegations of coercion and intimidation by the agents. *U.S. vs. Mendenhall,* 446 U.S. at 555.

In all of the above-cited cases, the courts dealt with factual situations wherein the criminal suspect voluntarily submitted to a show of authority. As such, the Court was not called upon to determine whether the initial police conduct would have constituted a seizure within the meaning of the Fourth Amendment if the suspect successfully or unsuccessfully resisted and/or eluded such authority. Such a determination is relevant in cases such as the case presently before this Court where the suspect initially resisted by fleeing and was subsequently captured when he collided with a roadblock or simply ran off the road through his own negligence. These latter scenarios should require the Court to focus upon the pursuit itself as a seizure independent of the fact that the suspect is eventially stopped either by arguably passive conduct of a police roadblock or through his own negligent driving.

In vehicle pursuit cases, close scrutiny of the initial chase would not be as critical if the setting up of the roadblock or the negligence in the suspect running off of the road were unquestionably the direct and immediate result of the police conduct. However, in the present case, the Ninth Circuit, arguing to the contrary, relied upon the Sixth Circuit's reasoning in *Galas vs. McKee,* 801 F.2d 200 (6th Circuit) when it determined that the Decedent herein, while he was stopped in the literal sense, was not seized by the pursuing deputies within the meaning of the Fourth Amendment.

In *Galas, supra,* the Sixth Circuit was called upon to decide whether a high speed chase constituted an unreasonable seizure. The suspect was injured when he accidently ran off of the road. The Court accepted the pre-

vious holdings of this Court that a Fourth Amendment seizure may result from a sufficient show of authority by police officers effectively restraining a person's freedom to leave. *Galas vs. McKee,* 801 F.2d at 203. However, the Court went on to reason that the plaintiff's/suspect's damages did not result from an official show of authority, and that while after the accident the suspect was not free to leave, this was not the result of restraint by the officers.

In the instant case the Ninth Circuit held that "Prior to his [Decedent] failure to stop voluntarily, his freedom of movement was never arrested or restrained." (Pet. Cert., A-9) By not considering the chase itself a seizure, the Ninth Circuit herein and the Sixth Circuit in *Galas vs. McKee, supra,* failed to apply the tests of *Terry vs. Ohio* and *U.S. vs. Mendenhall, supra.* Seizure, under *Terry vs. Ohio,* includes a threat of force and asks the question of whether the suspect was free to walk away. *U.S. vs. Mendenhall* asks the question of whether a reasonable person under the circumstances presented would be justified in believing that he was not free to ignore a show of authority. Certainly, if the mere presence of two officers positioning themselves on either side of a parked vehicle is sufficient to constitute a seizure (see *U.S. vs. Nicholas, supra*), then a high speed chase over a distance of approximately twenty miles should also constitute a seizure in and of itself within the meaning of the Fourth Amendment. Such police conduct was not only a show of authority, but also was an actual attempt to physically apprehend the Decedent.

Additionally, the Ninth Circuit herein held that "He [Decedent] had a number of opportunities to stop his automobile prior to the impact." (Pet. Cert., A-9) The Ninth Circuit's reasoning fails to appreciate that regardless of how many different opportunities the Decedent had to act in a particular manner during the pursuit, if his opportunities did not include the choice of ignoring the pursuing deputies and simply walking away, then he was most definitely seized within the meaning of the Fourth Amendment. To hold any differently is to deviate from the standards of *Terry vs. Ohio* and *Michigan vs. Chesternut, supra.* It is logical reasoning to find that the chase is coercive conduct constituting a seizure. Any fears of carrying *Terry* to an unreasonable extreme are misplaced since it takes more than a finding of a seizure for liability to attach. The Court must also make a determination of reasonableness and causation. Also, it is unrealistic to argue that those who successfully elude a police officer in a high speed chase are going to sue for a violation of civil rights.

The significance of accomplishing a seizure through a show of authority cannot be underestimated. Constitutional restrictions on law enforcement's ability to interfere with an individual's liberty by an official assertion of authority is a fundamental aspect of the Fourth Amendment guarantee that people shall be secure in their persons from unreasonable searches and seizures. See *Terry vs. Ohio, supra.* Absent such a limitation, law enforcement could become an instrument of oppression equally through intimidation and threat, as through physical force. The very nature and appearance of a police officer carries, for many citizens, an inherent sense of restraint, even a sense of threat. This inherent coercion does not involve the

Constitution in the context of police actions that are within the parameters of normal social interactions, even though the officer may well be investigating possible criminal conduct. The Constitution is implicated once the police officer does something extra, something beyond common social contact which increases the coercion inherent in the situation. LaFave, 3, *Search and Seizure*, Section 9.2(h) p. 412 (2nd Ed. 1987). See also LaFave's analysis of *People vs. Cantor*, 36 N.Y. 2d 106, 324 N.E.2d 872 (1975), at 3, *Search and Seizure*, Section 9.2(h) p. 413, fn 249.

In the present case, the circumstances surrounding the sheriff's deputies' conduct toward Decedent reveal no lack of coercion. The deputies and Decedent were involved in a late night, high speed chase on a two-lane highway covering a considerable distance with a roadblock spanning the entire width of the highway. Decedent was only suspected of stealing a car, not a crime of violence.

Having pursued Decedent for approximately twenty miles, it would certainly have been reasonable for Decedent to believe that the deputy was intending to stop him and restrain him. With the roadblock erected, Decedent was literally restrained from going on his way. At most, Decedent was able to flee, but he was not free to leave.

B. The Use Of A Concealed Roadblock Restrained Decedent's Freedom To "Leave" And As Such Constituted A Seizure Under The Fourth Amendment.

Alternatively, should this Court find that a high speed chase in and of itself cannot constitute a seizure, petitioners argue that the concealed roadblock with or without the

high speed chase constitutes a seizure within the meaning of the Fourth Amendment. Supporting this position is the reasoning of the Fifth Circuit Court of Appeal in *Jamieson vs. Shaw*, 772 F.2d 1205 (5th Cir. 1985). In *Jamieson*, the Court determined that a passenger was seized within the meaning of the Fourth Amendment when she was injured in a fleeing vehicle which collided with an unilluminated police roadblock parked across the middle of the highway, over the crest of a hill. Noting that an officer seizes a person whenever he restrains the freedom of a person to walk away, the Fifth Circuit held that the plaintiff in *Jamieson* was " 'seized' for purposes of the Fourth Amendment when the officers deliberately placed the roadblock in front of the car in which they knew she was a passenger." *Jamieson vs. Shaw*, 772 F.2d at 1210.

The Ninth Circuit herein attempted to distinguish *Jamieson* by claiming that a seizure occurred in *Jamieson* because the plaintiff in *Jamieson* was not the intended target of the police action. The speciousness of this argument is made plain in the dissent to the Ninth Circuit's opinion in the present case, stating that:

> If there is a valid distinction between the cases, it cuts in favor of allowing Brower's survivors to bring a claim. In *Jamieson*, the court found that a person who was *not* the target of a police roadblock could state a Fourth Amendment claim. In this case, however, Brower *was* the target. Indeed, this case is a clearer example of a "seizure" because the police actually intended to apprehend the victim of the roadblock—Brower. (Pet. Cert., A-16).

The reasoning of the Ninth Circuit herein would establish a rule of law that police officers need not be con-

cerned with the nature and quality of action taken to apprehend a person so long as the person suffering the effect of unreasonable police conduct can be designated a suspect.

The Ninth Circuit herein, further based its decision on the belief that the sheriff's deputies took no action to interfere with Brower's personal security or freedom of movement. The Court reasoned that it was not an official show of authority that caused Brower to collide with the roadblock, but an exercise of personal autonomy, the very thing that must be restrained in order for a seizure to occur. (Pet. Cert., A-9). The Ninth Circuit herein also focused on the point in time when Decedent's flight and the subsequent chase began, rather than when the roadblock was established and Decedent's flight, eventually, abruptly and fatally halted. The Ninth Circuit's reasoning is flawed; fleeing from the sheriff's deputy is relevant to a discussion of whether a high speed chase is a seizure. It is not relevant to a determination of the nature of the concealed roadblock.

Petitioners submit that the seizure of Decedent was complete when the roadblock was first established. The chase covered approximately twenty miles by the time the Decedent collided with the roadblock. After traveling that distance, it was unlikely that as long as the deputy continued the pursuit, the Decedent would stop except by force, an accident or the car running out of gas. As long as the roadblock remained in place, the Decedent was not free to disregard it and simply walk away. This is true regardless of whether decedent was aware of it. Although *Michigan vs. Chesternut* suggests that some communication to the suspect of a show of authority is required in order to constitute a seizure, this reasoning cannot apply in cases such as *Jamieson* and the case presently before the Court wherein hidden force was used. Requiring that a suspect be aware of all facts which may reasonably justify a belief that he is not free to leave, passes the point of reason where a police officer may avoid the proscriptions of the Fourth Amendment by creating a concealed death trap to apprehend the Decedent. Aside from any uncommunicated, subjective intentions of the deputies or of Decedent, by establishing the unilluminated roadblock, the officers had created objective circumstances in which, one of two objective results was possible: The Decedent would stop his car in which case it is seriously doubted that he would have been free to "walk away", or Decedent would not stop in which case, because of the concealed roadblock, he would be stopped by colliding with it.

Additionally, petitioners contend that the use of a concealed roadblock constituted deadly force and the apprehension of Decedent via such means constituted a seizure within the meaning of the Fourth Amendment. It was clearly established in *Tennessee vs. Garner,* 471 U.S. 1, 105 S.Ct. 1694 (1985), that " . . . there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Tennessee vs. Garner,* 471 U.S. 1, 7, 105 S.Ct. 1694, 1699. In *Tennessee vs. Garner,* a police officer, in order to prevent an escape, shot an unarmed fleeing burglar in the back of the head. Given the fact that the Decedent herein continued to flee for approximately twenty miles, it is likely that he would not suddenly stop fleeing. An unilluminated eighteen-wheel trac-

tor-trailer rig, parked completely across both lanes of a two-lane highway at night, behind a curve and behind the lights of a police car shining at the approaching driver is surely as deadly as a bullet aimed to the back of the head.

II.

THE NINTH CIRCUIT COURT OF APPEAL, BY FINDING THAT THE ALLEGED EXCESSIVE FORCE CONSTITUTED A VIOLATION OF SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT, "FOUND" AS A MATTER OF LAW THAT THE SAME CONDUCT CONSTITUTED AN UNREASONABLE SEIZURE UNDER THE FOURTH AMENDMENT.

Respondents'/defendants' lengthy, high speed chase culminating in decedent's apprehension and death by means of a concealed roadblock resulted in a "seizure" within the meaning of the Fourth Amendment. The question remains as to whether the seizure was reasonable.

A. Excessive Force During Arrest Is Necessarily Unreasonable Under The Fourth Amendment If It Is Also Violative Of Substantive Due Process Under The Fourteenth Amendment.

The Ninth Circuit Court of Appeals in the present case ruled that petitioners' First Amended Complaint stated a Fourteenth Amendment substantive due process violation by alleging that "respondents/defendants effectively concealed said truck (the tractor-trailer roadblock) from decedent's view by parking same behind a curve, failing and refusing to illuminate same and 'blinding' decedent by parking a police vehicle in the center of the

highway between said truck and decedent's approaching vehicle." (Pet. Cert., A-5)

In support of its ruling, the Ninth Circuit found that "The allegations plead more than a garden variety negligence in the construction of the roadblock." (Pet. Cert., A-5) The Ninth Circuit relied upon *Meredith vs. State of Arizona,* 523 F.2d 481, 484 (9th Cir. 1975) which established a violation of substantive due process upon a showing of police conduct which ". . . can fairly be characterized as 'intentional, unjustified, brutal and offensive to human dignity'." (Pet. Cert., A-4-5)

The Ninth Circuit held that petitioners' decedent was not seized in violation of the Fourth Amendment because the decedent was not "seized" within the meaning of the Fourth Amendment. (Pet. Cert., A-9-10) Having found no "seizure," the Court stated that it need not determine the reasonableness of the police conduct. Despite the fact that the Court expressly declined to determine the issue of reasonableness, petitioners contend that the Court nevertheless "determined," as a matter of law, that such conduct was unreasonable under the Fourth Amendment when it found that the same conduct violated substantive due process under the Fourteenth Amendment.

Petitioners submit that the protection afforded under substantive due process of the Fourteenth Amendment is at least co-extensive with and may be broader in its application than protection afforded under the Fourth Amendment. More specifically, excessive force which constitutes a violation of substantive due process under the Fourteenth Amendment necessarily constitutes an unreasonable seizure under the Fourth Amendment, *when the ex-*

cessive force is used in the course of a seizure. It is difficult to understand how conduct that was intended to apprehend the decedent and conduct that was "intentional, unjustified, brutal and offensive to human dignity" could constitute anything but an unreasonable seizure under the Fourth Amendment.

In support of this contention, petitioners rely on the following analysis of the distinctions, similarities and historical development of the Fourth and Fourteenth Amendments, commencing with the latter.

(1). *Fourteenth Amendment Standard of Liability* (Substantive Due Process).

Substantive due process developed as a nebulous but fundamental right grounded in the Fourteenth Amendment proscription against deprivation of life, liberty or property without due process of law. This Constitutional right was most notably recognized in *Rochin vs. California,* 342 U.S. 165, 72 S.Ct. 205 (1952). The Court in *Rochin* reviewed a criminal conviction for possession of narcotics. The defendant, upon realizing that he was about to be arrested, swallowed several balloons containing narcotics. The police forcibly and against the defendant's will, caused the defendant's stomach to be "pumped" in order to obtain the narcotics. The Court found that the conviction was obtained with evidence (the narcotics) that had been obtained in an offensive and intolerable *manner* which amounted to a violation of substantive due process under the Fourteenth Amendment. At the time of *Rochin,* the exclusionary rule pertaining to unlawful search and seizure under the Fourth Amendment had not yet been made applicable to the states.

Unlike the well recognized *procedural* due process right also emanating from the Fourteenth Amendment which guarantees minimal safeguards in the procedures for deprivation of life, liberty and property, *substantive* due process addresses the manner, nature and quality of the governmental intrusion.

In describing police conduct which violates substantive due process, the Court in *Rochin, supra,* at 342 U.S. 165, 169, 72 S.Ct. 205, 208 spoke of conduct which "'offend(s) those canons of decency and fairness which express the notions of justice of English speaking peoples even toward those charged with the most heinous offenses.'" The Court also defined substantive due process as a "summarized Constitutional guarantee of respect for those personal immunities . . . 'so rooted in tradition and conscience of our people as to be ranked as fundamental . . . or one implicit in the concept of ordered liberty'." *Id.* Difficulty in determining the circumstances under which to apply this right could well stem from the fact that it is in itself incapable of precise definition. As the court in *Rochin, supra,* stated at 342 U.S. 165, 169, 72 S.Ct. 205, 208, "these standards of justice are not authoritatively formulated anywhere as though they were specific."

The Second Circuit Court of Appeals in *Johnson vs. Glick,* 481 F.2d 1028 (2nd Cir.), cert. denied, 414 U.S. 1033 (2nd Cir. 1973) was not satisfied with the vague standards of *Rochin* when it was called upon to review a physical attack by a guard upon an individual who was being detained during his trial. The Court found that there might be a violation of substantive due process under the Fourteenth Amendment if the actual conduct reached Consti-

tutional proportions. It looked to *Rochin* and adopted four factors to be considered in determining whether such a Constitutional violation existed. *Johnson vs. Glick,* 481 F.2d 1028, 1033 (1973). Those factors include, (1) The need for the application of the force, (2) The relationship between the need and the amount of the force that was used, (3) The extent of injury inflicted, (4) Whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the very purpose of causing harm.

As opposed to the expressed objective standard for determining reasonableness under the Fourth Amendment, infra, the finding of a violation of substantive due process under the Fourteenth Amendment historically leaned toward a more subjective appraisal of the alleged wrongful conduct. However, the first three considerations set forth in *Johnson vs. Glick, supra,* suggest an objective analysis in determining whether the alleged conduct "shocks the conscience" under the test of *Rochin vs. California, supra.* The fourth factor dealing with malice, and thus the intent and motivation of the governmental agent, has developed as a distinguishing factor between the Fourth and Fourteenth Amendment and raises the question whether malice is a required element of proof to establish a violation of substantive due process or merely a factor to be considered within the totality of the circumstances. Some circuits, when dealing with a claimed violation of substantive due process, although not expressly

requiring proof of malice, at least consider the issue of malice.[1]

A clearer distinction between Fourth Amendment and Fourteenth Amendment claims was drawn in *Lester vs. City of Chicago,* 830 F.2d 706, 711-712 (7th Cir. 1987) which held that only Fourteenth Amendment substantive due process claims should include a subjective inquiry into the intent or motivation of the governmental agent and that a Fourth Amendment claim of excessive force should be judged strictly on an objective standard without reference to the agent's intent or motivation. This Court also held that actions for claimed excessive force during arrest are limited to the Fourth Amendment. It is interesting to note that the Ninth Circuit Court of Appeals has not limited a plaintiff to an action under the Fourth Amendment in cases involving claimed excessive force during an arrest. See *Smith vs. City of Fontana,* 818 F.2d 1411 (9th Cir. 1987). The holding by the Ninth Circuit in *Smith* permitting simultaneous allegations based upon both the Fourth and Fourteenth Amendments appears inconsistent with the statement of the Ninth Circuit in the decision herein appealed from. The lower court decision herein states, "It adds nothing to a well pleaded due process claim to assert that there was an unlawful seizure." (Pet. Cert., A-10) Petitioner contends that pleading a Fourth

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[1] *Shillingford vs. Holmes,* 634 F.2d 263, 265 (5th Cir. Unit A 1981) (police unprovoked clubbing of a tourist who was videotaping an arrest of another by police); *Smith vs. City of Fontana,* 818 F.2d 1411, 1417 (9th Cir. 1987) (deceased's estate permitted Section 1983 action on both Fourth and Fourteenth Amendments for excessive force in arrest); *Gilmere vs. City of Atlanta, GA,* 774 F.2d 1495, 1500-1501 (11th Cir. 1985) cert. den. 476 U.S. 1115 (1986).

Amendment violation in addition to a Fourteenth Amendment violation offers a very practical benefit. This arises in the context of jury instructions. An instruction which requires a finding that certain conduct "shocks the conscience" may prove more burdensome than one that calls for a determination of reasonableness.

(2). *Fourth Amendment Standard of Liability* (Unreasonable Seizure).

Unlike substantive due process under the Fourteenth Amendment, the Fourth Amendment proscription against unreasonable search and seizure is explicitly set forth and is relatively clear in its design. The United States Constitution, Fourth Amendment, states in part, "The right of the people to be secure in their persons, houses, papers and effects against *unreasonable* searches and seizures shall not be violated . . . ." (emphasis added) The guarantees of the Fourth Amendment address particular governmental conduct as it relates to search and seizure of an individual and his or her effects.

The Fourth Amendment not only governs the propriety of conducting a search or seizure in the first instance, but also governs the *manner and method* of implementing it. "The *manner* in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all. The Fourth Amendment proceeds as much by limitations upon the scope of the governmental action as by imposing preconditions upon its initiation." (emphasis added) *Terry vs. Ohio*, 392 U.S. 1, 28-29, 88 S.Ct. 1868, 1883-1884 (1968).

The Court in *Terry vs. Ohio, supra,* at 392 U.S. 1, 21-22, 88 S.Ct. 1868, 1880, stated an objective reasonableness

standard when determining a violation of the Fourth Amendment. The Court stated:

> . . . in justifying the particular intrusion, the police officer must be able to point to specific and *articulable* facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment, it is imperative that the facts be judged against an *objective standard;* would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief that the action taken was appropriate?' (emphasis added)

Recently, in a case similar to the present case, this Court addressed the issue of deadly force in the context of a seizure under the Fourth Amendment. In *Tennessee vs. Garner, supra,* a police officer, in order to prevent the escape of an apparently unarmed youth who had just burglarized a residence at nighttime, shot the youth in the back of the head. The officer identified himself as a police officer and advised the fleeing suspect that he was under arrest. The officer was acting under a Tennessee statute which arguably permitted deadly force to apprehend a fleeing felon after the police officer notified the suspect of an intent to arrest and the suspect thereafter flees or forceably resists. The Court ruled that the statute was not unconstitutional per se, but only to the extent that it permitted such deadly force towards those charged

with any felony, violent or otherwise. *Tennessee vs. Garner,* 471 U.S. 1, 105 S.Ct. 1694, 1701.

In keeping with the holding in *Terry vs. Ohio, supra,* and upon facts involving a seizure via deadly force, this Court in *Tennessee vs. Garner,* 471 U.S. 1, 7, 105 S.Ct. 1694, 1699 stated, " . . . there can be no question that apprehension by the use of deadly force is a seizure subject to the *reasonableness* requirement of the Fourth Amendment." (emphasis added) In terms of the objective test espoused in *Terry vs. Ohio, supra,* the Court in *Tennessee vs. Garner, supra,* commented, " . . . restated in Fourth Amendment terms, this means (officer) Hymon had no *articulable* basis to think Garner was armed." (emphasis added) 471 U.S. 1, 20, 105 S.Ct. 1694, 1706. Further evidencing the Court's imposition of an objective standard with respect to a Fourth Amendment seizure is the Court's requirement in *Tennessee vs. Garner, supra,* that the police officer have " . . . *probable cause* to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, . . ." (emphasis added) 471 U.S. 1, 105 S.Ct. 1694, 1701.

B. The Pursuit And The "Deadman" Roadblock, Upon A Balancing Of The Interests Of Decedent And Respondents, Constituted An Unreasonable Seizure Under The Fourth Amendment.

As seen above, a common thread that runs through both the Fourth and the Fourteenth Amendments is the fact that in both, the Court evaluates the nature and extent of the governmental intrusion to determine whether it is merely tortious in nature or rises to the level of a Constitutional violation. "The courts, however, have disagreed as to the standards for establishing personal security claims under the various amendments and have differed as to whether substantive due process is a viable ground for recovery when a plaintiff may alternatively invoke the protection of the Fourth Amendment. . . ." Albany Law Review-Winter, 1987 *Establishing a Deprivation Of A Constitutional Right To Personal Security Under Section 1983: The Use Of Unjustified Force By State Officials In Violation Of The Fourth, Eighth, And Fourteenth Amendments,* p. 175, by Kathryn R. Urbonya.

Whether the standards are more subjective in nature as with the early development (*Rochin, supra,*) of substantive due process under the Fourteenth Amendment or objective in nature as with the Fourth Amendment proscription against unreasonable seizure, this Court has always required a balancing of the governmental interest with that of the individual.

In the case of the Fourth Amendment, this Court has been explicit in its balancing requirement. "To determine the Constitutionality of a seizure, '[w]e must balance the nature and quality of the intrusion of the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion' . . . We have described 'the balancing of competing interests' as 'the key principle of the Fourth Amendment'." *Tennessee vs. Garner, supra,* 471 U.S. 1, 105 S.Ct. 1694, 1699 quoting from *United States vs. Place,* 462 U.S. 696, 703, 103 S.Ct. 2637, 2642; *Michigan vs. Summers,* 452 U.S. 692, 700 n.12, 101 S.Ct. 2587, 2593 n.12 (1981).

In the case of substantive due process under the Fourteenth Amendment, the Court has been less explicit in its requirements of the balancing test. Before the Second

Circuit Court of Appeals in *Johnson vs. Glick, supra,* expressed its factors to determine whether conduct "shocks the conscience," the *Rochin* test was highly subjective and therefore open to individualized interpretation. However, *Rochin* did, although with less specificity than the Court in *Terry vs. Ohio* and *Tennessee vs. Garner, supra,* require this same balancing of interests. "In each case, due process of law requires an evaluation based . . . on the detached consideration of conflicting claims . . . ." *Rochin vs. California,* 342 U.S. 165, 172, 72 S.Ct. 205, 209 (1952).

In the context of the present case, in order to determine whether the allegations of the First Amended Complaint state a claim under the Fourth Amendment, the Court must weigh the decedent's interest in his own life with the respondents' interest in apprehending the decedent. Once those interests are identified, the Court must then determine, ". . . whether the totality of the circumstances justified a particular sort of . . . seizure." *Tennessee vs. Garner, supra,* 471 U.S. 1, 105 S.Ct. 1694, 1700. As in *Tennessee vs. Garner, supra,* the respondents in the present case utilized deadly force to effectuate the seizure. Instead of a gun, the respondents herein set up a "deadman" roadblock from which there was no escape. The specifics of the First Amended Complaint allege facts which reasonably establish that the decedent was not and could not be aware that his path of travel during a high speed chase had been completely blocked. The First Amended Complaint alleges that "On the night of October 23, 1984, at approximately 11:15 p.m., defendant, CRAIG OYSTER, while on duty in his marked police vehicle, pursued decedent in a high speed chase southbound on

Highway 395 . . . a distance of approximately twenty miles." First Amended Complaint p. 5, lines 11 through 16. "Said defendants effectively concealed said truck from decedent's view by parking same behind a curve, failing and refusing to illuminate same and 'blinding' decedent by parking a police vehicle in the center of the highway between said truck and decedent's approaching vehicle. Said police vehicle had its head lamps shining directly into decedent's eyes as he approached. In his 'blinded' state, defendant drove past said police vehicle totally unaware of the presence of the tractor-trailer vehicle and collided into said vehicle causing severe injuries to decedent . . . he subsequently died from the injuries." First Amended Complaint, p. 6, lines 9-19.

The interests of Decedent and respondents herein were no different than those discussed in *Tennessee vs. Garner, supra.* The Decedent herein was suspected of committing a felony, i.e., auto theft, a non-violent property crime. The Decedent herein was young (17 years old), unarmed and attempting to elude the officer. As stated in *Tennessee vs. Garner, supra*:

> The suspect's fundamental interest in his own life need not be elaborated upon. The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment. Against these interests are ranged governmental interests in effective law enforcement. *Tennessee vs. Garner,* 471 U.S. 1, 105 S.Ct. 1694, 1700.

In rejecting the State of Tennessee's position that deadly force should be permissible for effective law enforcement and to encourage the peaceful submission of suspects, the Court held:

> We are not convinced that the use of deadly force is a sufficiently productive means of accomplishing them to justify the killing of non-violent suspects . . . the use of deadly force is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion. If successful, it guarantees that the mechanism will not be set in motion. *Tennessee vs. Garner,* 471 U.S. 1, 105 S.Ct. 1694, 1700.

Finally, and more specifically, with respect to the use of deadly force, this Court held:

> The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is Constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. *Tennessee vs. Garner,* 471 U.S. 1, 105 S.Ct. 1694, 1701.

Respondents herein have argued in the lower courts that Decedent herein was traveling at a high rate of speed and thus endangering other motorists on the highway. On page 10 of Appellees' Brief in the Ninth Circuit below, appellees state, "After engaging in a high speed chase for more than 25 miles on a highway, *where it may be inferred that such a chase was dangerous to the police officer and others using the highway,* the police officer had a roadblock set up." (emphasis added)

If the only danger presented to the police officer and other motorists stemmed from the Decedent's excessive speed, the respondents, who were insuring a high speed chase by continuing the pursuit instead of breaking off the

chase, should not now be permitted to justify the use of deadly force to protect against a danger they themselves created and/or assisted in. This is not to say that the officers should always abandon a high speed pursuit. However, the high speed pursuit (which may in some instances constitute deadly force) and the roadblock ("deadman" or otherwise) should not be utilized unless the interests they are designed to protect outweigh the risk of losing a human life, whether that life be the suspect's or a bystander. Certainly, in a civilized society, the possible theft of one more automobile and the possible escape of the youth suspected of stealing it, cannot justify such an ultimate sacrifice.

In the present case, the Ninth Circuit Court of Appeals, on the issue of whether a seizure had occurred, noted that the Decedent could have simply submitted to the officer's authority and thus avoided the roadblock. "Prior to his failure to stop voluntarily, his freedom of movement was never arrested or restrained. He had a number of opportunities to stop his automobile prior to the impact." (Pet. Cert., A-9) That was the same erroneous reasoning asserted by the District Court in *Tennessee vs. Garner,* 471 U.S. 1, 105 S.Ct. 1694, 1698. The District Court in *Tennessee vs. Garner* held that Garner had "recklessly and heedlessly attempted to vault over the fence to escape, thereby assuming the risk of being fired upon." Although this Court did not separately and expressly rule upon the assumption of risk defense, the holding of the Court did invalidate such reasoning. It is unthinkable that the Decedent could be deemed to have assumed the risk of being killed for stealing an automobile or resisting arrest in a

non-violent and arguably non-dangerous manner. In the present case, the Ninth Circuit's reliance upon the Decedent's available opportunities and choices of conduct is misplaced. The determination of a seizure under *Terry vs. Ohio, supra,* does not depend upon the number of available choices. Despite the number of choices, *Terry vs. Ohio* requires that one of those choices must include the right to freely ignore the governmental intrusion. Neither the Decedent in the present case nor the decedent in *Tennessee vs. Garner, supra,* had that requisite choice.

A logical comparison of the reasonableness test of a seizure under the Fourth Amendment and the first three factors of the *Johnson vs. Glick* test, *supra,* as to the violation of substantive due process under the Fourteenth Amendment reveal that all of the same considerations and balancing of interests are involved. The "need for the application of the force, the relationship between the need and the amount of the force that was used and the extent of the injury inflicted," require the Court to objectively examine the totality of the circumstances. To this extent, the Fourth Amendment proscription against unreasonable seizures and substantive due process under the Fourteenth Amendment are co-extensive.

The fourth factor in the *Johnson vs. Glick* test asks "whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the very purpose of causing harm." The Court in *Johnson vs. Glick, supra,* did not mandate that this subjective factor should be a required element of proof. Therefore, excessive force utilized in effectuating a seizure may violate both the Fourth and Fourteenth Amendments, whether malice is present or not.

If this Court were to require malice as an element of proof in establishing a substantive due process violation under the Fourteenth Amendment, then it is conceivable that such excessive force during an arrest, absent malice, may violate the Fourth Amendment and not the Fourteenth Amendment. Again, if malice is an element of proof in establishing a substantive due process violation under the Fourteenth Amendment, malicious conduct in the course of an arrest which violates substantive due process under the Fourteenth Amendment must necessarily be unreasonable under the Fourth Amendment. This must be so because both require a balancing of interests on a somewhat objective basis with the only added factor being that of malice under the Fourteenth Amendment. It is illogical to think that conduct in the course of an arrest which "shocks the conscience" could simultaneously be deemed a reasonable means of apprehension.

Petitioner submits that this Court has tacitly recognized that substantive due process is broader in its application than the Fourth Amendment proscription against unreasonable search and seizure. "Regard for the requirement of the due process clause 'inescapably' imposes upon this Court an exercise of judgment upon the *whole course of the proceedings* (resulting in a conviction) . . . ." (emphasis added) *Rochin vs. California,* 342 U.S. 165, 169, 72 S.Ct. 205, 208 (1952) As such, when the Ninth Circuit herein found that respondents' conduct as alleged, constituted a violation of substantive due process under the Fourteenth Amendment, it effectively determined that the same conduct established an unreasonable seizure under the Fourth Amendment.

———o———

CONCLUSION

The Ninth Circuit Court of Appeals herein erred in determining that the decedent was not seized within the meaning of the Fourth Amendment of the United States Constitution. Contrary to the Ninth Circuit's opinion, prior to the impact with the roadblock, the decedent did not have "freedom of movement." Also, the Ninth Circuit's statement that the decedent was "never arrested or restrained" too narrowly defines seizure under the Fourth Amendment. This Court has equated a seizure under the Fourth Amendment with governmental intrusion which falls short of a formal arrest. The decedent herein was restrained from ignoring the officers and simply walking away because of the pursuit and concealed roadblock.

Given the historical and parallel development of the Fourth Amendment proscription against unreasonable seizures and substantive due process under the Fourteenth Amendment, petitioners submit that claimed excessive force, whether at the time or an arrest or otherwise, should be judged by a standard which considers the totality of the circumstances. Petitioners contend that the use of the "deadman" roadblock under the circumstances presented in the present case, constitutes deadly force and was unreasonable in light of the vastly disproportionate interests of the parties. If this Court finds that a seizure in fact occurred, petitioners submit that the conduct of respondents in the course of the seizure, having been found to violate substantive due process under the Fourteenth Amendment, necessarily constitutes an unreasonable seizure under the Fourth Amendment.

Respectfully submitted,

ROBERT G. GILMORE*
GILMORE & HANCOCK
470 East Herndon, Suite 201
Fresno, California 93710
(209) 436-1100
Counsel for Petitioners

CRAIG A. DIAMOND
SHINE, BROWNE & DIAMOND, APC
434 Colfax Avenue
Grass Valley, California 95945
(916) 272-2685
Counsel for Petitioners

LINDA J. ZACHRITZ
Attorney at Law
1111 Fulton Mall, Suite 615
Fresno, California 93721
(209) 266-1443
Counsel for Petitioners

*Counsel of Record

August 22, 1988

RESPONDENT'S

BRIEF

(5)

No. 87-248

In The

Supreme Court of the United States

October Term, 1988

GEORGIA BROWER, individually and
as Administrator of the
ESTATE OF WILLIAM JAMES CALDWELL (BROWER);
WILLIAM JAMES CALDWELL (BROWER), Decedent;
SCOTT DANIEL KING, a minor;
RENEE KING, individually and as
Guardian ad Litem for SCOTT DANIEL KING,

Petitioners,

v.

COUNTY OF INYO, INYO COUNTY
SHERIFF'S DEPARTMENT, DONALD DORSEY,
CRAIG OYSTER AND REGINAL SIDES,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

GREGORY L. JAMES
County Counsel
PHILIP W. McDOWELL
Assistant County Counsel
County of Inyo
P.O. Box 428
Independence, CA 93526
(619) 878-2411

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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SUMMARY OF ARGUMENT

The petitioners have belatedly raised the issue of a pursuit constituting a seizure by amending the "Questions Presented" set forth in their brief on the merits. The issue has never before been raised, plead, or briefed in the four year history of this case. The pleadings present the Court with no appropriate record and no facts upon which to decide if the alleged high speed pursuit was a seizure. Further, a flight and an ensuing pursuit from apprehension can never operate as a fourth amendment seizure until the pursuit achieves a restraining effect. It is the governmental conduct, if any, which results in a seizure which must be scrutinized for fourth amendment reasonableness.

The use of deadly force, including a roadblock, to apprehend a fleeing felon who is attempting escape by means of a dangerous high speed vehicle pursuit is not constitutionally prohibited. The petitioners have failed to allege sufficient facts to state a "plain" claim for which they are entitled to relief. Such a claim must be based on sufficient allegations to demonstrate that the alleged conduct was intentional or sufficiently reckless to state a tort of constitutional dimension and not merely common negligence. The petitioners' ambiguous pleadings fail to plainly state such a claim of fourth amendment unreasonableness.

ARGUMENT

INTRODUCTION

The Petitoners in the conclusion of their brief ask that this Court find that a seizure occurred by the use of a roadblock and the preceding high speed pursuit. Further,

the Petitioners ask that this Court find that law enforcement's conduct in establishing the roadblock constituted an unreasonable use of deadly force in making that seizure. It should be noted that law enforcement's conduct is not before this Court at this time, only the allegations of law enforcement's conduct as set forth in the petitioners' complaint. There will only be a review of the reasonableness of law enforcement's conduct when and if the petitoners' pleadings have been found to be sufficient. It is the issue of the sufficiency of the petitioners' allegations and not the actual conduct of law enforcement that is to be reviewed in this proceeding.

I.

BECAUSE OF THE LACK OF A FACTUAL RECORD, THIS CASE IS NOT RIPE FOR DECISION ON THE BELATEDLY RAISED ISSUE OF A HIGH SPEED PURSUIT CONSTITUTING A SEIZURE

The issue of pursuit as constituting a seizure was not raised until the filing of the petitioners' Brief on the Merits before this Court. The pleadings in this case have never been framed, plead, briefed, argued, or decided based upon that issue. There are virtually no facts before this Court upon which to decide this issue. The petitioners allege nothing more than a high speed chase by Deputy Oyster in a marked police vehicle on the night of October 23, 1984 for a distance of approximately twenty miles on U. S. Highway 395. (JA. 7-8.) The petitioners provide the Court with no workable rule to govern high-speed pursuits. There is a complete failure to provide a record upon which to devise such a rule.

In a case that was appropriately plead and briefed on this issue, the relevant facts would be before the Court. Such a hypothetical case would include significant additional facts. For example, the actual speeds of the vehicles would undoubtably be known. Sustained speeds of 85-90 miles per hour would present a danger to all persons on or about the related section of highway. Traffic conditions and points of congestion would be known. The manner in which the pursued vehicle was being driven would be of importance. While speed alone presents a serious danger, erratic driving, such as having several near head-on collisions and the inability to maintain the pursued vehicle on the right half of the roadway, could well indicate maliciousness, or equally as dangerous, impaired driving abilities because of drugs and/or alcohol. The facts might reveal additional violations or motives which caused the pursued to feel compelled to flee from capture. The complete details of law enforcement's conduct of the pursuit would also be known. From such a complete record, the Court could, if it so chose, attempt to devise constitutional rules govening high speed pursuits.

The petitioners suggest that there is, of course, a simple solution to the dangers of high-speed vehicle pursuits. Don't allow law enforcement to engage in them. Unfortunately, as the old saying goes – for every complex problem there is a simple answer – and that answer is invariably wrong. The petitioners ask this Court to summarily hold that high-speed vehicle pursuits are constitutionally prohibited and thereby set a constitutional speed limit for law enforcement but not for the fleeing felon. The petitioners' solution is both drastic and unsound and highlights why this Court should not use this case as an

instrument upon which to mold a national policy governing law enforcement pursuits. The issue is simply not presented under the facts of this case.

II

A PURSUIT CANNOT BECOME A SEIZURE WITHOUT A SHOWING THAT LAW ENFORCEMENT'S CONDUCT ACHIEVED A RESTRAINING EFFECT

A. THE FACTS ALLEGED IN THE PETITIONERS' COMPLAINT ARE TOTALLY DEVOID OF ANY COERCIVE CONDUCT BY LAW ENFORCEMENT UPON WHICH TO BASE A SEIZURE

Assuming, arguendo, that a pursuit or a chase can be a seizure in some circumstances, more than is alleged by the petitioners' complaint is required. The petitioners' complaint does not allege that the pursuing deputy did anything other than pursue the decedent's vehicle. That could have been nothing more than the matching of the decedent's speed while at a discreet distance. The Sine Qua Non of the seizure of a person is the actual restraint of, or the submission to authority by, a person who reasonably believes that he or she is not free to leave. *U.S. v. Brigoni-Ponce*, 422 U.S. 873, 880 (1975); *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

There are no allegations of the use of a siren or emergency lights, or of any commands to halt, or of a display of weapons, or the operation of the marked police vehicle in an aggressive manner to block or control the decedent's movements. The pleadings of the petitioners' do not meet the test set forth in *Michigan v. Chesternut*,

486 U.S. ___, of the "coercive effect of police conduct, taken as a whole." (108 S.Ct. at page 1979) The pleadings admit of no coercive conduct by the pursuing deputy. The allegation of the high speed pursuit is devoid of any details, even to the extent of what occasioned the initiation of the pursuit. Was the decedent traveling at a high rate of speed when the deputy in his vehicle fell in behind to pursue, or did the decedent accelerate to high speeds upon first sighting the deputy? These questions are of little importance since the complaint fails to allege any coercive conduct by the deputy during the pursuit in the first instance.

This point is further mooted by the fact that the actual or literal restraint of the decedent that did occur, occurred separate and apart from the pursuit, as a result of the decedent's collision with the roadblock. (JA. 8-9) If the roadblock is construed as a seizure of the decedent, it is not necessary to establish a seizure by the pursuit. Likewise, if the roadblock is not a seizure, then the pursuit leading up to the roadblock could not logically be a seizure in and of itself.

B. THE DECEDENT WAS NEVER RESTRAINED IN ANY WAY BY THE PURSUIT, AND NO SEIZURE RESULTED FROM THE PURSUIT

A pursuit should not be considered a seizure. The very essence of a seizure, the actual physical apprehension or the submission to authority, is in direct conflict with the concept of flight from arrest. The flight and any ensuing pursuit is the very exercise, however illegal, of the suspects "right to walk away." A mere show of

authority should not result in a seizure without a resulting restraint. *Cameron v. City of Pontiac*, 813 F.2d 782, 785 (6th Cir. 1987)

The petitioners' logical weakness in this area is revealed in the petitioners' suggested solution to the problem. The petitioners suggest that to avoid the dangers associated with the pursuit, regardless of the reasonableness of the method of pursuit, that law enforcement should allow the suspect to flee unpursued. In other words, a person who is "seized" by the initial pursuit, but whose flight creates a substantial danger, would be released by a termination of the pursuit. Under this counterproductive solution, a suspect who peacefully submits to a seizure would be arrested and those who resist, particularly in a dangerous manner, would be free to go.

The inference in the petitioners' brief is that persons suspected of violent crimes may be pursued, despite the inherent dangers of a high speed pursuit. This is apparently a concession to the balancing required under fourth amendment analysis in comparing the need for the governmental intrusion against the benefit to society in general. This balancing should be equally applicable to allow the continous pursuit in the situation of the "non-violent" felon who takes flight in a violent or dangerous manner. However, under the petitioners' logic, a suspected rapist found on the street who utilizes a weapon to resist law enforcement's attempt to arrest would be subject to continued efforts to seize and arrest him. Meanwhile, in the same encounter with a car thief who utilizes a weapon to resist arrest, the officers should holster their weapons and await a time and place when the suspect is in a better

frame of mind to be arrested. The petitioners would have the Court believe that it is really law enforcement that creates the danger by the mere attempt to arrest or detain the suspect, rather than assigning any of the responsibility for the consequences upon the fleeing felon.

The petitioners' solution of pursuit termination is based upon a false premise. Petitioners assume that if law enforcement terminate a pursuit: (1) the pursued suspect will perceive the fact of his freedom; and (2) that regardless of the suspect's perception of whether he is being actively pursued, he will assume safe behavior patterns in his driving habits or in any other conduct in which he engages to further his escape. The petitioners supply us with no data to support the assumption that a fleeing felon who has just felt the warm breath of the pursuing constable on the back of his neck will nonchalantly return to his business of unimpeded escape in a safe and reasonable manner.

It is clear that a suspect who still possesses viable options in the exercise of his freedom of movement, i.e., his "freedom to flee," is not seized in a constitutional sense. In our case, the decedent had a full range of options open to him until he ran into the roadblock. The decedent's options, to name a few, included using any of the side and back roads to further his escape, flight on foot, or going into hiding. The decedent could have made a U-turn to flee northbound away from both the pursuing deputy and the allegedly concealed roadblock. It is not logical to say that a pursued suspect is seized in a fourth amendment sense as long as he continues to effectively avoid capture. A fleeing suspect, regardless of whether or

not law enforcement's conduct communicates to the suspect a reasonable belief that it intends to apprehend him, is not entitled to fourth amendment protection until law enforcement's conduct achieves a restraining effect. (See, e.g., *Ins. v. Delgado,* 466 U.S. 210, 215 (1984); *U.S. v. Mendenhall,* 446 U.S. 544, 554 (1980).

III

THE OFFICERS WERE JUSTIFIED IN USING A ROADBLOCK TO RESTRAIN THE DECEDENT'S ABILITY TO FLEE

A. A ROADBLOCK IS A WELL ESTABLISHED LAW ENFORCEMENT METHOD OF STOPPING AND APPREHENDING FLEEING SUSPECTS AND IS PERMITTED BY THE CONSTITUTION.

"A roadblock, used to identify and apprehend persons who have committed a crime, must be distinguished from a barricade, which is instead used to terminate the flight of a known offender. It is not uncommon for the police to barricade a road with police cars or commandeered vehicles in order to stop a person who has fled from the police at such a high rate of speed that it would be impossible or highly dangerous to try to overtake him. Their authority to do so is unquestioned; it 'is inherent in the power and the duties of law enforcement officers if those duties are to be effectively discharged.' (*Kagel v. Brugger,* 19 Wis.2d 1; 119 N.W.2d 394 [1963]) Consequently, it would seen clear that even if the presence of the barricade causes other vehicles to slow down substantially or even to stop for a brief period of time, the practice is not constitionally objectionable" (LaFave, 3, Search and Seizure, Second 9.5[c] pp. 553-554).

The use of a roadblock or barricade in this case follows a long history of court approval of the practice to apprehend fleeing felony suspects. While the practical utilization of the roadblock is, of course, subject to constitutional limitation, the practice in general is constitutionally acceptable. The Court should " . . . hesitate to declare a police practice of long standing 'unreasonable' if doing so would severly hamper effective law enforcement." (*Tennessee v. Garner,* 471 U.S. 1, 14 [1985].) In an age of ever increasing mobility, particularly by automobile, the roadblock remains an effective method to halt or deter fleeing felons and in the case of a determined suspect, perhaps the only way to thwart such escape.

B. THE OFFICERS HAD PROBABLE CAUSE TO BELIEVE THAT THE DECEDENT WAS A FLEEING FELON WHOSE CONDUCT CONSTITUTED A SIGNIFICANT DANGER TO PERSONS ON OR ABOUT THE HIGHWAY, THEREFORE, THE DEPUTIES HAD THE RIGHT TO USE DEADLY FORCE.

The Ninth Circuit opined that the actual restraint of the decedent by the roadblock did not constitute a seizure. (*Brower v. Inyo County,* 817 F.2d 540 [9th Cir. 1987].) However, assuming for the sake of argument that the decedent's collision with the roadblock was a seizure, the remaining issue is whether there are sufficient allegations which set forth unreasonable conduct in the carrying out of that seizure to bring this case within the ambit of fourth amendment protection. The fourth amendment comes into play to prohibit state officials from using egregious or outrageous force in seizing a person in order to make an arrest. *Stanulonis v. Marzec,* (D. Conn., 1986) 649 F.Supp. 1536. In *Tennessee v. Garner,* the rule is set out

that a law enforcement officer can utilize deadly force to apprehend a fleeing felon, "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." (*Tennessee v. Garner, supra* p. 11) This rule is not limited just to violent felonies but applies to all felons who pose a serious threat to others.

California law is in accord with *Tennessee v. Garner, supra,* and it has been settled for over a decade that the use of deadly force in making arrests is restricted to "violent" felonies which threaten death or serious bodily harm or where there are other circumstances which reasonably create a fear of death or serious bodily harm to the officer or other persons. (*People v. Cebellos,* (1974) 12 Cal.3d 470, 479; 116 Cal.Rptr. 233; *Kortum v. Alkire,* (1977) 69 C.A.3d 325, 332, 138 Cal.Rptr. 26; California Penal Code sections 196, 197 and 835 [a].)

Unlike the unarmed burglary suspect in the *Garner* case, the decedent here was armed with a dangerous instrument, the stolen vehicle, and was using it in a dangerous manner.[1] "Without question high speed pursuits place the suspect, the officer and the public in general at risk of death or serious bodily injury." *Galas v. McKee,* (6th Cir. 1986) 801 F.2d 200, 203.

This is not to suggest that every speeding motorist should be stopped by the use of deadly force. However,

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[1] "To respond to this threat by establishing a roadblock is not unreasonable under the circumstances. October 22, 1985 (Petition of Certiorari, p. A-21), Decision and Order.

in our case the decedent was not just a speeding motorist; the decedent was a person who the deputy had probable cause to believe was in the process of committing and continuing to commit a felony. That belief could only be bolstered when the deputy found himself in a dangerous twenty mile high-speed pursuit. The complaint itself discloses that the pursuing deputy had probable cause to believe that the decedent was in possession of a stolen vehicle. The deputy had probable cause to detain, if not arrest, the decedent for a felony. (California Penal Code sections 484, 487, subd. 3, and California Vehicle Code section 10851.)

Under these circumstances, Deputy Oyster was permitted by the fourth amendment to use deadly force. The deputy could have shot at the decedent and or his vehicle in an effort to halt his flight. The use of a roadblock is an reasonable a use of deadly force as a bullet; and, in many cases, a roadblock may be a more reasonable use of passive force. In other words, if the deputy had a right to shoot the decedent, then the deputy had the right to stop the decedent with a roadblock, concealed or not.

The *Garner* case requires that there be a warning given, if feasible. As is discussed below, the facts demonstrate that Deputy Sides' action of placing his patrol car with its lights on in the middle of the two lane highway was a warning of the roadblock and not an attempt to blind the decedent as petitioners claim. Further, as the petitioners note, at least twice in their Brief on the Merits (pp. 16 & 17), the decedent was not likely to be stopped without the use of force, therefore, any warning of the roadblock would be in vain as well as self defeating under these circumstances.

C. THE PETITIONERS' COMPLAINT SETS FORTH AMBIGUOUS AND INCONSISTENT FACTS AND, THEREFORE, FAILS TO MAKE A PLAIN STATEMENT OF A CLAIM FOR WHICH PETITIONERS ARE ENTITLED TO RELIEF UNDER THE FOURTH AMENDMENT.

The petitioners' complaint on its' face sets forth facts of the officers' belief of reasonable cause to detain and arrest the decedent for a felony. The complaint further states that the decedent by his own actions was a fleeing felon and chose a highly dangerous method of escape – a high speed chase over twenty miles at nighttime. The petitioners rely heavily on the case of *Jamieson v. Shaw,* 772 F.2d 1205 (5th Cir. 1985). However, in *Jamieson v. Shaw,* neither the unintended passenger victim nor the intended driver suspect were fleeing felons at the time of the use of the alleged roadblock.

The lawfulness for the use of deadly force in this case is shown on the face of the First Amended Complaint. The decedent was a fleeing felon who posed a significant threat of injury or death to others. The petitioners in order to state a claim under the fourth amendment must allege more than just negligent conduct. The petitioners must reasonably set forth facts that demonstrate that law enforcement engaged in intentional or sufficiently reckless conduct in the application of the otherwise lawful use of force. *Davidson v. Cannon,* 474 U.S. 344 (1986), *Daniels v. Williams,* 474 U.S. 327 (1986), *Johnson v. Glick,* 481 F.2d 1028 (2d Cir. 1973).

"The use of deadly force will not automatically constitute a constitutional tort. . . . [U]se of deadly force does not violate the Fourth Amendment when used to

prevent the escape of a suspect who has threatened an officer with a weapon or has committed a crime involving the infliction of serious physical harm on others. Similarly, the use of deadly force may not constitute a violation of the Fourteenth Amendment due process clause."

O'Neal v. DeKalb County, GA., 667 F.Supp. 853 (N.D.Ga. 1987)

The law allows the officers to use deadly force, and a warning is not required when in vain or not feasible. It is up to the petitioners to state a claim in terms of intentional or reckless conduct. The best that can be said for the petitioners' complaint is that a claim for negligence is stated.

The purpose of a roadblock is not necessarily to kill or injure. The primary purpose is to cause the vehicle to stop to allow final apprehension by a safer method. The petition does not allege that Deputy Sides, either alone or in collusion with Deputy Oyster, intended to create a "deadman"[2] roadblock. Rather, the allegations are that three factors, combined with the darkness of the night, to

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[2] "Deadman" – This term which petitioners have used of late in their brief was presumably borrowed from *Jamieson v. Shaw,* supra, at p. 1207. It apparently refers to a roadblock which is concealed and/or for which an affirmative distraction, such as blinding by a spotlight, is used to insure that the driver does not see the roadblock to insure collision rather than a voluntary halt or further evasion.

"effectively" create the alleged "deadman" roadblock. If the petitioners thought that the facts and the proofs warranted it, they could have alleged that the roadblock was intentionally designed to be concealed and to mortally stop the decedent without warning.

The alleged three factors are themselves markedly inconsistent and insufficient. One factor is the alleged placement of the roadblock "behind" a curve. The second factor is the alleged "failure and refusal" to illuminate the roadblock or, at least, the truck and trailer portion. The third factor is the placement of the patrol car in the middle of the highway with it's headlamps on and pointing in the direction of the decedent's oncoming car to "blind" the decedent.

There is nothing in these allegations to suggest that the circumstances, if proved, were anything more than negligence. The complaint does not tell us how a curve conceals something. Was the curve a vertical curve (a hill) as apparently it was in the *Jamieson* case in which the roadblock was concealed "just over the crest of a hill." (*Jamieson, supra,* 1209.) If so, why isn't this intentional conduct alleged? How far behind the curve was the roadblock placed – 200 feet, 1/10th of a mile, 1/2 of a mile, a mile? Surely the petitioners have done the investigation required by Rule 11 of the Federal Rules of Civil Procedure and this fact can easily be included in a short and plain version of the pleadings. What does it mean that the officer "failed and refused" to illuminate the truck and trailer? Does this mean that the headlamps and running lights were extinguished, or that the otherwise lighted truck was not illuminated by an external source? In other words, was the truck and trailer actually darkened or just not illuminated to the satisfaction of the petitioners' hindsight.

Now comes the most puzzling factor. If the roadblock is neatly tucked behind a curve and not visible, and for good measure all lights are extinguished, why is it necessary to blind the driver of the oncoming car. Isn't the placement of the patrol car ahead of the truck and trailer, but behind the curve, counterproductive? How is your intended victim going to steer around the concealing corner into your roadblock if you blind him? But, if you do choose to blind the oncoming driver why do it with a patrol vehicle PARKED in the middle of the two lane road? This blinding allegation obviously gave the District Court Judge problems.[3]

The pleadings must be read as true for the sake of a motion to dismiss and in favor of the petitioner, *Gaut v. Sunn,* 792 F.2d 874, 875 (9th Cir. 1986). When read in favor of the petitioners, the complaint may state a claim for common negligence. The complaint, however, does not state a claim of constitutional dimension.

"Then *Daniels* and *Davidson* make if clear that liability under section 1983 does not arise from merely negligent conduct. The court has yet to define to what extent section 1983 liability may be predicated on reckless or grossly negligent conduct. It would seem, however, that at least reckless conduct can give rise to an 'arbitrary exercise of the powers of government' which section 1983 was designed to protect against, and, therefore, should

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[3] "Decedent was warned of the existence of the roadblock by a police vehicle parked in the *middle of the highway* facing the decedent approximately 200 feet ahead of the roadblock." October 22, 1985, Decision and Order, (Petition for Certiorari, p. A-21).

come under the reach of the statute" Sand, Modern Federal Jury Instructions, Vol 4, pp. 87-172.

Therefore, to articulate a 1983 Fourth Amendment claim the petitioners must show that the officer(s) intended to construct a "deadman" roadblock or that in so constucting the roadblock they did so in a reckless manner or in conscious disregard of the known probable consequences, i.e., that it would be concealed.

CONCLUSION

The respondents request that the Court determine that the utilization of roadblocks and road barricades are constitutionally permissible. That regardless of whether the roadblock in this case constituted a seizure, the allegations of the petitioners' complaint do not set forth sufficient facts to support the finding that the roadblock was constitutionally unreasonable within the meaning of the fourth amendment.

Respectfully submitted,

GREGORY L. JAMES
County Counsel
PHILIP W. MCDOWELL
Assistant County Counsel
County of Inyo
P.O. Box 428
Independence, CA 93526
(619) 878-2411

REPLY

BRIEF

No. 87-248

In The

Supreme Court of the United States

October Term, 1988

GEORGIA BROWER, individually and as Administrator of the ESTATE OF WILLIAM JAMES CALDWELL (BROWER); WILLIAM JAMES CALDWELL (BROWER), Decedent; SCOTT DANIEL KING, a minor; RENEE KING, individually and as Guardian ad Litem for SCOTT DANIEL KING,

Petitioners,

v.

COUNTY OF INYO, INYO COUNTY SHERIFF'S DEPARTMENT, DONALD DORSEY, CRAIG OYSTER, and REGINAL SIDES,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

ROBERT G. GILMORE*
GILMORE & HANCOCK
470 East Herndon, Suite 201
Fresno, California 93710
(209) 436-1100
Counsel for Petitioners

CRAIG A. DIAMOND
SHINE, BROWNE & DIAMOND, APC
434 Colfax Avenue
Grass Valley, California 95945
(916) 272-2685
Counsel for Petitioners

LINDA J. ZACHRITZ
Attorney at Law
1111 Fulton Mall, Suite 615
Fresno, California 93721
(209) 266-1443
Counsel for Petitioners

*Counsel of Record

October 13, 1988

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE ISSUE OF THE HIGH SPEED VEHICLE CHASE CONSTITUTES A SEIZURE INDEPENDENT OF THE PHYSICAL ROADBLOCK IS PROPERLY BEFORE THIS COURT.

2. WHETHER RESPONDENTS CONFUSE ISSUES OF THE LEGAL EXISTENCE OF A SEIZURE AS PLEAD WITH A FACTUAL QUESTION OF UNREASONABLENESS REQUIRED FOR LIABILITY TO FINALLY ATTACH.

3. WHETHER "SEIZURE" UNDER THE FOURTH AMENDMENT REQUIRES A PHYSICAL APPREHENSION OR SUBMISSION TO AUTHORITY.

4. WHETHER THE SUBJECT ROADBLOCK, AS ESTABLISHED, CONSTITUTED UNREASONABLE FORCE IN VIOLATION OF THE FOURTH AMENDMENT.

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I.

THE ISSUE OF WHETHER THE HIGH SPEED VEHICLE CHASE CONSTITUTES A SEIZURE INDEPENDENT OF THE PHYSICAL ROADBLOCK IS PROPERLY BEFORE THIS COURT

Petitioners' complaint herein (J.A. 7, 8) specifically alleges:

> 20. On the *night* of October 23, 1984, at approximately 11:15 p.m., defendant, CRAIG OYSTER, while on duty in his *marked police vehicle, pursued* DECEDENT in a *high speed chase* southbound on Highway 395 from the City of Lone Pine, County of Inyo, to the City of Cartago, also in the County of Inyo, *a distance of approximately twenty miles*. Said *pursuit* allegedly resulted from defendant OYSTER'S belief that DECEDENT was in possession of a stolen vehicle. (Emphasis added)

Additionally, Petitioners' Opening Brief before the Ninth Circuit Court of Appeals specifically sets forth factual allegations on the issue of the pursuit itself. In that brief, under "STATEMENT OF CASE" (page 2) petitioners stated: "On said date at approximately 11:30 p.m., decedent was being *pursued* southbound on Highway 395 in Inyo County by Inyo County Deputy Sheriff, Craig Oyster . . . the *pursuit* extended through approximately twenty-five miles of desert wasteland . . . decedent drove past the right side of the police vehicle at a *high rate of speed* and slammed into the tractor-trailer rig killing him within a short time thereafter." On Page 4 of Appellants' Opening Brief before the Ninth Circuit Court of Appeals, petitioners stated: "Appellants contend that appellees, . . . applied *unreasonable and excessive force in the pursuit* of appellant. . . ."

In further support of their position, petitioners invite the Court's attention to Petitioners' Petition for Writ of Certiorari filed herein. At Page 5 under "STATEMENT OF THE CASE", it is therein stated:

> Petitioners' Complaint arises out of *defendants' attempts to apprehend* WILLIAM JAMES CALDWELL, DECEDENT, for allegedly possessing a stolen vehicle. At approximately 11:30 p.m. *on the night* of October 23, 1984, decedent, a minor, was being *pursued* by Inyo County Sheriff's Deputy, Craig Oyster. Decedent and Oyster were driving southbound on Highway 395, a two-lane highway in Inyo County. Deputy Oyster *pursued decedent through approximately twenty-five miles of desert land* at which time Deputy Oyster radioed ahead to Deputy Sides requesting a roadblock.

A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim, shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief,. . . ." Federal Rules of Civil Procedure Rule 8(a)(2). Also, "Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." Federal Rules of Civil Procedure Rule 8(e)(1).

Petitioners herein have consistently set forth specific allegations of the pursuit itself. As commented upon by petitioners in their Petition for Writ of Certiorari, the emphasis has been focused on the physical roadblock itself. Such focus has never undermined petitioners' right to seek damages based upon the pursuit itself nor has it deprived this Court of jurisdiction to determine whether the vehicle pursuit itself constitutes a seizure within the meaning of the Fourth Amendment to the United States Constitution.

From the time the petitioners' Complaint was filed in 1985, until the case of *Michigan vs. Chesternut*, 486 U.S. ___, 108 S.Ct. 1975 (1988), the cases involving roadblocks and the issue of seizure under the Fourth Amendment focused predominantly on an ultimate collision with the roadblock or running off of the road. Such cases have been cited by all parties herein and include without limitation those of *Jamieson vs. Shaw*, 772 F.2d 1205 (5th Cir. 1985) and *Galas vs. McKee*, 801 F.2d 200 (6th Cir. 1986). With *Michigan vs. Chesternut*, we now not only focus upon the ultimate collision or "capture" but also upon the totality of the circumstances, including the pursuit.

Most persuasive on the issue as to whether the pursuit itself is validly before this Court is the Opinion of the Ninth Circuit Court of Appeals which states, "We agree with the *Galas* decision. In this case, as the *twenty mile chase* makes plain, Brower consciously chose to avoid official restraint. *That decision, an exercise of autonomy, cannot fairly be viewed as a "seizure" by the police,* under the fourth amendment. Brower's seizure, if any, was the result of his own effort in avoiding numerous opportunities to stop." J.A. 9 (emphasis added). While this is contrary to petitioner's position herein, it certainly demonstrates that the issue of the pursuit itself is properly before this Court.

II.

RESPONDENTS' CONFUSE ISSUES OF THE LEGAL EXISTENCE OF A SEIZURE AS PLEAD WITH A FACTUAL QUESTION OF UNREASONABLENESS REQUIRED FOR LIABILITY TO FINALLY ATTACH.

Respondents are inappropriately trying to argue factual contentions at the pleading stage of this lawsuit. In

doing so, respondents ignore the issue raised by petitioner, i.e., that the pursuit, as alleged, constitutes a seizure as protected by the Fourth Amendment of the United States Constitution. Instead, on this limited issue of seizure, respondents chose to argue about the reasonableness of the seizure. Specifically, at Page 4 of Respondents' Brief, respondents argue that petitioners made no allegations of the "use of a siren or emergency lights, or of any commands to halt, or of a display of weapons, or the operation of the marked police vehicle in an aggressive manner to block or control the decedent's movements." Such specific allegations are but a few of the conceivably endless factors to be determined in viewing the reasonableness of the seizure itself. Concededly, such allegations would also assist the Court in determining whether, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Michigan vs. Chesternut*, 486 U.S. ___, 108 S.Ct. 1975, 1979 (1988), quoting *U.S. vs. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877 (1980). However, the test espoused in these latter two cases looks to the "coercive effect of police conduct, taken as a whole." Alleging a high speed pursuit at night for approximately twenty-five miles would lead a reasonable person to believe that the suspect was not free to walk away and simply ignore such a show of authority.

III.

RESPONDENTS MISINTERPRET "SEIZURE" UNDER THE FOURTH AMENDMENT AS REQUIRING A PHYSICAL APPREHENSION OR SUBMISSION TO AUTHORITY.

Respondents argue that a seizure is not accomplished short of "actual physical apprehension or the submission

to authority." (Respondents' Brief, page 5), citing *Cameron vs. City of Pontiac*, 813 F.2d 782 (6th Cir. 1987) and *INS vs. Delgado*, 466 U.S. 210 (1984). These cases do not support such a proposition. In *Cameron vs. City of Pontiac*, the same Court which decided *Galas vs. McKee* focused its attention on whether the suspect was actually restrained. The Sixth Circuit in *Cameron* appears to contradict its earlier acceptance of the *Mendenhall* test which is based on whether, given the surrounding circumstances, the suspect reasonably believed that he was not free to walk away. *Id.* at 785. As stated by petitioners in their Petition for Writ of Certiorari and Opening Brief, such reasoning is not in accord with the law as stated by this Court.

As to *INS vs. Delgado*, respondents appear to almost completely misapprehend what the case appears to stand for. In *INS* this Court held that the general questioning of employees in a factory concerning their immigration status did not constitute an ongoing seizure of the entire workplace and did not constitute seizure of the individuals questioned. *INS vs. Delgado, supra*, 466 U.S. at 218, 221. On this latter point, the Court found that "[t]he manner in which respondents (employees) were questioned, given its obvious purpose, could hardly result in a reasonable fear that respondents were not free to continue working or to move about the factory." *INS vs. Delgado, supra*, 466 U.S. at 220. Contrary to respondents' citation, petitioners could find no indication in *INS* that this Court held in that case that a seizure occurs only when law enforcement achieves a restraining effect. In fact, in *INS* the finding of no seizure is phrased in terms of the manner of the questioning and the unreasonableness of resulting fears or beliefs of the employees. *Id.* at 220. The decision of *INS* clearly follows the test as set out in *U.S. vs. Mendenhall* that a question of whether a Fourth

Amendment seizure occurs focuses on the manner of the police conduct and the reasonable beliefs to be inferred from that conduct, not on whether some type of actual physical restraint occurred. Certainly, such reasoning as in *INS vs. Delgado* does not support respondents' implied contention that a suspect's " 'freedom to flee' " is equivalent to every person's constitutionally protected freedom to walk away from police authority. (*See* Respondents' Brief, page 7).

As judicially defined for purposes of the Fourth Amendment, this Court has not required such a literal interpretation of restraint. To the contrary, absent physical restraint by law enforcement agents, this Court has focused upon the nature of the police conduct as directed toward the suspect and not upon the ultimate physical restraint to determine whether a seizure occurred. The objective test of *U.S. vs. Mendenhall*, 446 U.S. 544 (1980) and *Michigan vs. Chesternut*, 486 U.S. ___, 108 S.Ct. 1975 (1988) may lead to the finding of a seizure within the meaning of the Fourth Amendment even without physical restraint. This test inquires as to whether the police conduct was coercive to the point that a reasonable person would believe that he was not free to ignore the police authority. (Petitioner's Brief, Page 10) It is interesting to note that in *Chesternut* the Court emphasized that the police were merely following the suspect as opposed to chasing him. The contrary is alleged by petitioners herein.

Finally, on the issue of the pursuit itself as constituting a seizure, respondents unfairly and inaccurately argue that petitioners would never allow law enforcement to give chase regardless of the reasonableness of the

methods used. (Respondents' Brief, Page 6) This is not petitioners' view. At page 31 of Petitioners' Opening Brief, petitioners state, "This is not to say that the officers should always abandon a high speed pursuit. However, the high speed pursuit . . . and the roadblock . . . should not be utilized unless the interests they are designed to protect outweigh the risk of losing a human life . . . " In addition to such inaccuracies, respondents confuse the real issue, i.e., whether the pursuit itself constitutes a seizure, regardless of its reasonableness or lack therof. Once a seizure is found, the issues of reasonableness, causation and damages can be determined.

Furthermore on the issue of seizure, respondents in their brief have failed to address the central issue of whether the tractor-trailer roadblock constituted a seizure within the meaning of the Fourth Amendment. After arguing that the pursuit itself did not constitute a seizure, respondents at page 9 of their brief, proceed directly to the reasonableness of the roadblock. Respondents assumed, "for the sake of argument," that the roadblock did constitute such a seizure. Respondents do not brief the issue for the Court and do not dispute petitioners' contention that the roadblock, as used against decedent, constitutes a seizure within the meaning of the Fourth Amendment.

IV.

THE SUBJECT ROADBLOCK, AS ESTABLISHED, CONSTITUTES UNREASONABLE FORCE IN VIOLATION OF THE FOURTH AMENDMENT.

It is the method and manner of utilizing a roadblock as opposed to the roadblock itself that violates the Fourth Amendment. Respondents attempt to draw a distinction

between a "roadblock" and a "barricade." They state that the former is used to identify and apprehend someone who has committed a crime, whereas the latter is designed to terminate the flight of a known offender. Respondents also contend that roadblocks and barricades are a long standing and necessary tool of law enforcement and as such should not be eliminated. Petitioner agrees. However, as respondents recognize at page 9 of their brief, " . . . the practical utilization of the roadblock is, of course, subject to constitutional limitation . . . " Contrary to respondents' inference, petitioners make no suggestion that this court declare a police practice of long standing, i.e., the roadblock, unconstitutional per se.

The factual allegations in petitioners' complaint concerning the pursuit and the roadblock sufficiently allege intentional or at least gross negligence, either of which amounts to an unreasonable seizure under the Fourth Amendment. Respondents chose to argue a lack of specific allegations charging intentional or reckless conduct on the part of the deputy sheriffs. As already argued in Petitioners' Opening Brief, the Ninth Circuit found that the allegation charged more than mere negligence and in fact allege conduct sufficiently egregious to constitute a violation of substantive due process under the Fourteenth Amendment.

Respondents contend that a fleeing suspect such as the decedent herein poses a sufficiently high risk of injury as to warrant the use of deadly force. While the use of deadly force on a fleeing felon who poses a serious physical threat to the officers or others around him is a valid proposition under *Tennessee vs. Garner,* 471 U.S. 1

(1985), respondents are reminded that this writ proceeding is before this Court on a motion to dismiss and not a summary judgment. As such, there are no facts before this Court to suggest that the decedent actually posed a threat to anyone. At the initial pleading stage, it is simply impossible for petitioners to allege each and every minute detail of the pursuit and apprehension as may be developed in formal discovery, nor is such detail required. Pursuant to Rule 8 of the Federal Rules of Civil Procedure, as set forth above, petitioners have sufficiently pled intentional/reckless conduct by pleading a concealed roadblock, the blinding of the decedent and the failure/refusal of the respondents to illuminate the roadblock. Also, assuming arguendo that decedent's conduct herein posed a threat of serious injury to others, there is still the question of whether respondents were constitutionally authorized to take his life without warning by means of a concealed roadblock.

Again, the question of the reasonableness of roadblocks and/or barricades in general is not before the Court. It is too much to ask this Court to find that deadly force is authorized in all high speed pursuits. Even respondents concede that not all speeding motorists should be stopped via deadly force. They argue that such force was authorized as against the decedent herein because the decedent was a fleeing felon. Under the circumstances as alleged in the complaint, the respondents contend that "The deputy could have shot at the decedent and/or his vehicle in an effort to halt his flight." (Respondents' Brief, Page 11) Respondents seem to differentiate between "every speeding motorist" and a speeding motorist who is also a suspected felon. If this be

the only difference and assuming for arguments sake that this difference is a valid difference, then one must follow the dictates of *Tennessee vs. Garner* and consider the nature and seriousness of the original felony and the nature of the threat posed. In this case as in *Tennessee vs. Garner,* we are dealing with a property crime. If the respondents would not use deadly force, including a roadblock or a "bullet", on a speeding motorist who may well pose a danger to other drivers, then it is imcompatible with common notions of justice to use deadly force simply to retrieve a stolen vehicle.

Respectfully submitted,

ROBERT G. GILMORE*
GILMORE & HANCOCK
470 East Herndon, Suite 201
Fresno, California 93710
Counsel for Petitioners

CRAIG A. DIAMOND
SHINE, BROWNE & DIAMOND
434 Colfax Avenue
Grass Valley, California 95945
Counsel for Petitioners

LINDA J. ZACHRITZ
Attorney at Law
1111 Fulton Mall, Suite 615
Fresno, California 93721
Counsel for Petitioners

*Counsel of Record

October 13, 1988